



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5G

THE BAHAMAS

This is the **summative (formal) assessment** for **Module 5G** of this course and is compulsory for 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 5G. 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.assessment5G]**. An example would be something along the following lines: 202122-336.assessment5G. **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 **8 pages**.

ANSWER ALL THE QUESTIONS 50/50 = 100% Excellent work!

QUESTION 1 (multiple-choice questions) [10 marks in total] 10/10

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 1 point

Select the **correct answer**:

How many modes of winding up a Bahamian company, exist?

- (a) Two.
- (b) Three.**
- (c) Four.
- (d) Five.

Question 1.2 1 point

Select the **correct answer**:

When is a Bahamian company deemed to be unable to pay its debts under section 188 of the Companies Act, Ch 308?

- (a) Only when it is balance sheet insolvent.
- (b) Only when it is cash flow insolvent.
- (c) When it is balance sheet insolvent and cash flow insolvent.
- (d) When it is either balance sheet insolvent or cash flow insolvent, or a valid statutory demand has not been satisfied within a period of three weeks after service on the company's registered office, or if a judgment in favour of a creditor remains unsatisfied.**

Question 1.3 1 point

Select the **correct answer**:

In what order are the following paid in a compulsory liquidation under Bahamian law?

(i) Employees' salaries, wages and gratuities; (ii) all taxes, assessments or impositions imposed or made under any Bahamian Act; (iii) sums due for employees medical insurance; (iv) wages for any workman or labourer regarding services rendered to the company two months before the commencement of the company's liquidation.

(a) (i), (ii), (iii), (iv).

(b) (ii), (i), (iv), (iii).

(c) (iii), (i), (iv), (ii).

(d) (i), (iii), (iv), (ii).

Question 1.4 1 point

Select the **correct answer**:

What is the minimum percentage of the members required to resolve for a Company's voluntary winding up?

(a) 45%.

(b) 50%.

(c) 75%.

(d) 95%.

Question 1.5 1 point

Select the **correct answer**:

What is the clawback period for voidable preferences under section 241 of the Companies Act, Ch 308?

(a) One (1) month.

(b) Six (6) months.

(c) Twelve (12) months.

(d) Two (2) years.

Question 1.6 1 point

Select the **correct answer**:

What types of preferential transactions are voidable in an insolvent liquidation?

- (a) Every fraudulent conveyance or transfer of property.
- (b) Every charge made three years before the commencement of the liquidation.
- (c) Every payment obligation made after the commencement of the liquidation.
- (d) All of the above.

Question 1.7 1 point

Select the **correct answer**:

Who may apply for the winding up of a Bahamian company?

- (a) A regulator, if the company is a regulated entity.
- (b) The company's receiver.
- (c) Any officer of the company.
- (d) The Supreme Court of The Bahamas.

Question 1.8 1 point

Select the **correct answer**:

Where do secured creditors rank in a liquidation?

- (a) Behind the costs and expenses of liquidation.
- (b) Behind preferential creditors.
- (c) Behind unsecured creditors.
- (d) In priority to all other creditors, since they can enforce their security outside of the liquidation.

Question 1.9 1 point

Select the **correct answer**:

Under which circumstance may a company be wound up by the Court?

- (a) The Court is of the opinion that it is just and equitable that the company should be wound up.
- (b) The company is insolvent.
- (c) The company did not commence its business within a year from its incorporation, or suspends its business for a whole year.
- (d) All of the above.

Question 1.10 1 point

Select the correct answer:

What is the effect of a winding-up?

- (a) The liquidator acquires custody and control of the company's assets.
- (b) Unless the court orders, no share in the company may be transferred.
- (c) Both (a) and (b).
- (d) Neither (a) nor (b).

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 4 marks] 4 marks

What is the difference between a provisional liquidator and an official liquidator?

The main difference between a provisional liquidator and an official liquidator in the Bahamas is the timing of their appointment. A provisional liquidator is appointed after the presentation of a winding up petition but before a winding-up order is made by the Court pursuant to section 199 of the Companies (Winding-Up) Amendment Act 2011. Whereas an official liquidator is appointed after a winding-up order is made as per section 200. The power of the provisional liquidator is limited to those necessary to maintain the value of the assets owned and managed by the Company. The power of the official liquidator is wide ranging and include (a) collecting, realizing and distributing the assets of the company to its creditors and, if there is a surplus, to the persons entitled to such assets in accordance with this Act; and (b) investigating and reporting to the company's creditors and contributories upon the affairs of the company and the manner in which it has been wound up. Another key difference is the way in which provisional liquidators and official liquidators are appointed. Provisional liquidators are appointed by the court, on application by a creditor, contributory of the company or any relevant regulator on the grounds (a) there is a prima facie case for making a winding up order; and (b) the appointment of a

provisional liquidator is necessary- (i) to prevent the dissipation or misuse of the company's assets, (ii) to prevent the oppression of minority shareholders, (iii) to prevent mismanagement or misconduct on the part of the company's directors, or in the public interest. Official liquidators are appointed by the court for the purpose of conducting the proceedings in winding up a company and assisting the court therein. The Court may appoint to such office such a person as it thinks fit.

Question 2.2 [maximum 2 marks] 2 marks

In what circumstances may a regulator present a winding-up petition for the winding-up of a company?

A regulator may present a winding-up petition of a company over which it has regulatory authority and whose licence or registration has been suspended or revoked. Section 190 (4) of the Companies (Winding- Up) Amendment Act provides that:

“A winding up petition may be presented by a relevant regulator in respect of any company which is carrying on a regulated business in The Bahamas upon the grounds that it is not duly licensed or registered to do so under the regulatory laws or for any other reason as provided under the regulatory laws or any other law.”

Additionally, a regulator can also apply for the appointment of a provisional liquidator on the grounds (a) there is a 'prima facie case for making a winding up order; and (b) the appointment of a provisional liquidator is necessary- (i) to prevent the dissipation or misuse of the company's assets, (ii) to prevent the oppression of minority shareholders, (iii) to prevent mismanagement or misconduct on the part of the company's directors, or (iv) in the public interest.

Question 2.3 [maximum 4 marks] 4 marks

Describe the circumstances in which a transaction may be set aside by the liquidator.

A credit and security transactions may be set aside by the liquidator if it occurred at a time when the company was insolvent in order to the creditor a preference over the creditors. A liquidator may also set aside a transaction in certain circumstances, such as:

- Where the transaction/disposition was made at an undervalue: If a company sells or transfers its assets for less than their true value with an intent to defraud creditors, the liquidator can set aside this type of transaction/disposition¹ as a voidable

¹ Section 242 indicates that this includes every form of conveyance, transfer, assignment, lease, mortgage, pledge or other transaction by which any legal or equitable interest in property is created, transferred or extinguished.

preference. The application to set aside must be made within two years of the date of the said transaction as mandated by section 242 (4) of the Companies Act.

- Where a preference has been made: Where a company pays a debt to one creditor ahead of other creditors when the company was insolvent (When the company is unable to pay its debts within the meaning of section 188) in order to give that creditor a preference, the liquidator can apply to set aside this transaction if it was made within six months of the company's insolvency.²

The liquidator must apply to the court to set aside a transaction. If the court sets aside a transaction, the assets that were transferred under the transaction will be returned to the company and distributed in accordance with the company's liquidation process.

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

Question 3.1 [maximum 8 marks] 8 marks

Write a brief essay on the circumstances in which the Supreme Court would make ancillary orders under section 254 of the Companies Act.

Section 254 of the Companies Act provides that upon the application of a foreign representative the court may make orders ancillary to a foreign proceeding for the purposes of (a) recognising the right of a foreign representative to act in The Bahamas on behalf of or in the name of a debtor and, in the court's discretion, to do so jointly with a qualified insolvency practitioner; (b) enjoining the commencement or staying the continuation of legal proceedings against a debtor.

In the Matter of Caledonian Bank Limited³, the Bahamas Supreme Court considered the connection between common law authority to order asset transfers to foreign main proceedings where an ancillary liquidation is ongoing and statutory provisions in recognition proceedings that permit property transfers to debtors. The case resulted from a request made under sections 254 and 255 of the Companies Act asking Caledonian Bank's liquidators for instructions on how to divert cash sent within the Bahamas to principal liquidators in the Cayman Islands. The Court determined that while Part VIIA of the Companies (Winding-up Amendment) Act concentrates on international cooperation in bankruptcy procedures, it does not apply to auxiliary winding-up proceedings. However, it was acknowledged that under common law, the court can order asset remittal in an ancillary liquidation to the principal liquidation and held that there was no restriction because the court has the power to order the remittal of assets to a foreign liquidation where local law provided for a *pari passu* distribution.

In the matter of (1) Atelier Design e Planejamento de Moveis Ltda (“Atelier”) and others⁴ the Petitioner applied to be recognized as a Foreign Representative in The Bahamas with the right to act on behalf or in the name of the Millo Group of Companies (In Official Liquidation) (“the Millo Group The application was made pursuant to section 254(1)(a) of the

² Section 241 of the Companies Act.

³ [2017] 1 BHS J No 55.

⁴ 2021/COM/com/00063

Companies (Winding Up Amendment) Act, No. 53 of 2011. The Millo Group of Companies were incorporated in Sao Paulo, Brazil and were subject to the Brazilian Court's supervised bankruptcy issued by Judge Rodrigo Gorga Campos in the 9th Civil Court of Sao Bernardo do Campo, Brazil. The Petitioner was appointed by the Brazilian Court as Judicial Administrator on 16 November 2017 and maintained his position on 21 November 2018.

Upon application for bankruptcy, some of the Millo Group companies declared that they did not have any bank accounts despite being companies with operations and sales. Two of the companies were owned by Bahamian entities prior to being sold. According to the Central Bank of Brazil records, each of the Bahamian company sent a wire transfer to Nogueira Alva, one of the Millo Companies. These transfers suggest that the Bahamian entities had bank accounts of value outside of Brazil. The Petitioner deposed that if he is recognized to act in The Bahamas jointly with a qualified insolvency practitioner on behalf of the Millo Group, this would allow for an application for disclosure of information by the Bahamian companies and this information may assist in the maximization of recovery efforts of resources that may have been diverted from the payment of creditors.

The Court granted the applications by the Petitioner and pursuant to section 254(1)(a) of the Companies (Winding Up Amendment) Act, 2011, the Petitioner was recognized as a foreign representative for the purposes of acting in The Bahamas on behalf of the Millo Group of Companies. The Court considered section 255 which sets out the criteria upon which the court's discretion shall be exercised namely: (1) In determining whether to make an ancillary order under section 254, the court shall be guided by matters which will best assure an economic and expeditious administration of the debtor's estate, consistent with

- (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 Bahamas against prejudice and inconvenience in the processing of claims in the foreign 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 VII;
- (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

Further the Court noted at paragraph 13 that the Millo Group of companies were incorporated in Brazil and are subject to the Brazilian Court's supervised bankruptcy issued by the Court which therefore satisfied the definition of "debtor" and "foreign proceeding" pursuant to section 253 of the Companies Act. The petitioner having been appointed by the Brazilian court as judicial administrator satisfied the definition of a "foreign representative". Consequently Schedule (Rule 3) of the Foreign Proceedings (International Co-operation) (Relevant Foreign Countries) Liquidation Rules, 2016 ("the FPLR 2016") sets out the designation of relevant foreign countries and Brazil was one of them. Additionally, in the interest of comity between The Bahamas and Brazil, the petitioner ought to be recognized as a foreign representative in The Bahamas with the right to act on behalf or in the name of the Millo Group.⁵ Thus for all the reasons mentioned above, the Court exercised its discretion under section 254 of the Act in recognizing Mr. Chad as a foreign representative for the purposes of acting in The Bahamas on behalf of or in the name of the Millo Group of Companies in ancillary proceedings. Consequently, the case law discussed above highlighta

⁵ Paragraph 17 of the Judgment.

the circumstances that the Court will consider whether to make an ancillary order under section 254 of the Companies Act.

Question 3.2 [maximum 7 marks] 7 marks

Write a brief essay distinguishing between the enforcement of a judgment of a court in Bermuda and the enforcement of a judgment of a court in India.

For a judgment of a court in Bermuda to be enforced in the Bahamas it must be registered or given recognition by the Bahamas Supreme Court under the Reciprocal enforcement of Judgments Act 1924 (REJA) and associated legislation. Statutory registration is generally governed by the Reciprocal Enforcement of Judgments Act, 1924 (the "REJA") and the associated subsidiary legislation. The REJA applies only to judgments obtained in the United Kingdom and certain Commonwealth Countries, namely: Barbados, Bermuda, Jamaica, Leeward Islands (Antigua & Barbuda, Montserrat, St. Kitts & Nevis, Anguilla, and the British Virgin Islands), St. Lucia, Trinidad & Tobago, Guyana, Belize, and Australia.

The Supreme Court has jurisdiction and the discretion to register a foreign judgment under Section 3(1) of the REJA which provides:

" 3. (1) Where a judgment has been obtained in a superior court outside The Bahamas the judgment creditor may apply to the Supreme Court, at any time within twelve months after the date of the judgment, or such longer period as may be allowed by the court, to have the judgment registered in the court, and on any such application the court may, if in all the circumstances of the case it thinks it is just and convenient that the judgment should be enforced in The Bahamas and subject to the provisions of this section, order the judgment to be registered accordingly."

A judgment from Bermuda must be a judgment in terms as defined in section of the Act in order to be recognised. Section 2 that specifies that:

"judgment" means any judgment or order given or made by a court in any civil proceedings whether before or after the passing of this Act and includes an award in proceedings on an arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place.

Additionally, the Court may refuse registration of the Bermudian Judgment, or it may be challenged by the judgment debtor on any of the grounds provided in section 3(2) which states that:

3. "(2) No judgment shall be ordered to be registered under this section if —

(a) the original court acted without jurisdiction;

(b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court;

(c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court;

(d) the judgment was obtained by fraud;

(e) the judgment debtor satisfies the registering court either that an appeal is pending or that he is entitled or intends to appeal against the judgment;

(f) the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the registering court.”

Once the Bermudian judgment complies with the relevant sections of the REJA and the Court grants the Order registering the judgment of the Bermuda court it becomes a judgment recognized in The Bahamas and the judgment creditor can proceed to enforcement. The Judgment may be enforced under Order 45, rule 1 (1) of the Rules of the Supreme Court. The means of enforcement include writ of fieri facias, garnishee proceedings, charging order, appointment of a receiver, committal, and writ of sequestration.

In addition, a foreign judgment may be enforced by the sale of land if the debtor's assets in The Bahamas include land and the court deems it necessary and expedient to order the sale and under Order 31, Rule 1 of the Rules of the Supreme Court. The judgment creates an equitable charge on the debtor's land under Section 63(1) of the Supreme Court Act. However, this equitable charge can only be created if the judgment debt is definite or ascertainable.

On the other hand, a judgment from the Court in India would not be recognised under REJA since it is not a Country to which the application of the Act has been extended. Consequently, a judgment from India can only be recognised and enforced under the common law. The judgment creditor with a judgment from India can commence an action or file a counterclaim in the Supreme Court of The Bahamas relying on the judgment debt as the cause of action. The issue of jurisdiction over the judgment debtor would have to be resolved thus if the judgment debtor does not reside or carry on business in The Bahamas, the judgment creditor must first obtain leave for service out of the jurisdiction before commencing the proceedings, since without service the Bahamian Courts does not have jurisdiction over the judgment debtor.

Once service outside the jurisdiction is approved by the Court or deemed unnecessary the judgment creditor can proceed to have the Indian judgment recognized under the common law. The requirements for recognition of a judgment from India are that:

- The foreign court must have been of competent jurisdiction.
- The rules of natural justice must have been complied with in the foreign proceedings.
- The foreign judgment must have been final and conclusive.
- The judgment debt must be definite or ascertainable.
- The foreign judgment must not have been obtained by fraud.
- Enforcement of the foreign judgment must not be contrary to public policy in The Bahamas.

If any of these requirements are not met, the judgment debtor can oppose the recognition and enforcement of the foreign judgment. Once the judgment of a court from India is

recognised and an order made by the Bahamas Supreme Court the judgment is enforceable as any other Bahamian judgment and under the procedures highlighted above.

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

Supreme Company Limited (the Company) was incorporated in 2000 in the British Virgin Islands as an investment company. It held offices in Nassau, The Bahamas and carried on business in The Bahamas, Bermuda, Jamaica, Aruba, Brazil, Uruguay and Colombia. Since its incorporation, the Company conducted business in the Caribbean and South American markets. The Securities Commission of The Bahamas regulated the Company.

In 2020, due to the pandemic, the Company experienced significant losses. To prevent insolvency, the Company's directors in April 2021 borrowed BSD 2,000,000 from two of its nine directors, namely John Smith and Robert Lewis. The loan was memorialised in a loan agreement dated 30 April 2021. The terms of the loan agreement provided that the loan would be repaid in full by 31 December 2022 and would be used to meet the Company's recurring liabilities and responsibilities. In May 2022, the directors discovered that the Company's finance manager, Giovanni Wilson, misappropriated BSD 500,000 and used the funds to acquire real estate. The directors did not inform the Commission of Mr Wilson's wrongdoing. As a result of Mr Wilson's actions, the Company has been insolvent since June 2022. Notwithstanding the Company's insolvency, the Company has continued to trade, Mr Wilson continues to serve as its financial manager, and the directors have not resigned.

Using the facts above, answer the questions that follow.

Question 4.1 [maximum 7 marks] 7 marks

Can a winding-up petition be filed in The Bahamas for the Company's winding up? Explain your answer by discussing the Bahamian Supreme Court's jurisdiction to make winding up orders, and state on which ground any winding up petition could be filed and by whom.

Pursuant to section 185 of the Companies (Winding-Up) Act 2011 the Bahamian Supreme Court has jurisdiction to make winding up orders in respect of- (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 Bahamas, (ii) is carrying on business in The Bahamas, or (iii) is registered under Part VI. Therefore, because Supreme Company Limited (the Company) held offices in Nassau, The Bahamas and carried on business in The Bahamas and is regulated by the Securities Commission of The Bahamas a winding up petition can be filed in the Bahamas for the winding up of the Company.

Section 186 of the Act states the circumstances in which a company may be wound up by the court which are:

"A company may be wound up by the court if- (a) the company has passed a resolution requiring the company to be wound up by the court; (b) the company does not commence its business within a year from its incorporation, or suspends its business for a whole year; (c) the company is insolvent; (d) the members are reduced in number to less than two; (e) the court is of the opinion that it just and equitable that the company should be wound up; or (f) a regulator petitions for the winding up of a company over which it has regulatory authority and whose licence or registration has been suspended or revoked.

Since the Company has been insolvent since June 2022 a petition may be presented to wind it up. Considering this an insolvency a petition can be filed by any creditor, contributor, regulator or the Company itself. It is noted that in April 2021 the company borrowed BSD 2,000,000 from two of its directors namely John Smith and Robert Lewis thus they are also creditors of the company. Thus, to seek repayment of the debt which was memorialised in a loan agreement dated 30 April 2021 they can file a petition to wind up the company on the grounds that it is insolvent. Additionally considering the misappropriation of BSD 500,000 by the Company's finance manager, Giovanni Wilson, the two directors can assert that the Company be wound up on the just and equitable grounds. In the matter of Windward Asset Management International Limited, (a shareholder and director of jet test international limited) v Seabird International Holdings Limited, (a shareholder and director of jet test international limited)⁶ the Court stated at paragraph 19 that:

"Unlike the insolvency ground, there is no definition in the CWUA of what ought to constitute circumstances for the court to be satisfied that it is just and equitable that the company should be wound up. The absence of a definition is not surprising as the leading case in this area of insolvency law appears to suggest that the categories of cases which fall to be classified under this head is never closed. The oft cited opinion of Lord Wilberforce in the English House of Lords Decision in *Ebrahimi v Westbourne Galleries* [1973] AC 360 is found at page 379 of the judgment:

"It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise.... if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere."

The Court further noted that in that case the partnership had soured, thus it was certainly the classic case for the winding up under the just and equitable ground. Considering the misappropriation by the finance manager, the dissipation of the loan not for its intended purpose and mismanagement or misconduct on the part of the company's directors/board by continuing to trade whilst the company was insolvent can give cause for the Court to grant an order for the winding up on the ground that it is just and equitable.

Also, The Securities Commission of The Bahamas as the regulator can also apply to the court for the Company to be wound up. There are several issues which may cause the regulator to intervene and suspend or revoke the company's licence or registration which include:

1. The directors did not inform the Commission of Mr Wilson's wrongdoing.
2. Notwithstanding the Company's insolvency, the Company has continued to trade.
3. Mr Wilson continues to serve as its financial manager despite misappropriating funds.
4. The directors have not resigned although they are aware of the mismanagement of the Company.

⁶ 2021/COM/com/000055

The regulator can file the petition to wind up the company once its licence or registration has been revoked or suspended. The regulator can file the petition on the ground that it has regulatory authority over the Company, the company is insolvent and that in all the circumstances it is just and equitable that the Company be wound up.

Question 4.2 [maximum 8 marks] 8 marks

To what extent could the Company's Board be liable for the Company's insolvency and failure to act, given their knowledge of Mr Wilson's wrongful actions and misappropriation of BSD 500,000?

The company's board may be liable for the company's insolvency and failure to act, given their knowledge of Mr Wilson's wrongful actions and misappropriation of BSD 500,000. The Supreme Court in an action to hold the Board accountable will consider several factors, including:

- The extent of the board's knowledge of wrongful actions and misappropriation of funds.
- Whether the board took any steps to investigate or stop the wrongful actions and misappropriation of funds.
- Whether the board's failure to act contributed to the company's insolvency.

In general, a board of directors has a duty to act in the best interests of the company and its creditors. This includes a duty to take reasonable steps to prevent the company from becoming insolvent, act honestly and in good faith and exercise the care, diligence and skill that a reasonably prudent person would exercise in the circumstances. Section 81 of the Companies Act provides that:

"81. (1) Every director and officer of a company in exercising his powers and discharging his duties shall — (a) act honestly and in good faith with a view to the best interests of the company; and (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. (2) The duty imposed by subsection (1) on the directors of a company is owed by them to the company alone; and the duty shall be enforceable in the same way as any other fiduciary duty owed to a company by its directors."

The actions of the board in this scenario do not exemplify good faith and acting honestly because the company was allowed to trade whilst insolvent and not informing the commission of Mr. Wilson's wrongdoing. Consequently, the board may be held personally liable for the company's debts which occurred as a result of these omissions and actions and may have to restore the funds which were lost and not otherwise recovered.

Halsbury Laws of England States:

" Although the directors of a company are not properly speaking trustees, they have always been considered and treated as trustees of company money or property which comes into their hands or which is under their control...Where the loss arises

from the unauthorised application of the company's property, the measure of compensation is the value of the company's property which has been misapplied and the director may be held liable even though he has not himself received any of the misapplied property.... A director may also be liable to pay equitable compensation to a company where, as a result of a breach of fiduciary duty on his part, the company has suffered loss... A director is liable for the acts of his co-directors, if, knowing that they intend to commit a breach of trust, he does not, by applying for an injunction or otherwise¹², take steps to prevent it... The liability of directors participating in breaches of trust and in respect of secret profits is joint and several"⁷

Thus, if the board of directors fails to act, they may be held responsible for the losses and damages incurred by the company and its creditors. The court may order the directors to contribute to the company's assets in an amount that is deemed necessary if it is determined that the board's negligence directly contributed to the company's insolvency and that the board knew or should have known that there was no reasonable prospect of avoiding liquidation due to insolvency. Section 83 of the Act also allows for the disqualification of directors from holding management positions.

The board may also be held liable for insolvent trading if it continues to trade while insolvent. If a director has concerns about a company's financial stability, they should investigate the situation and take the necessary steps to protect the company's interests. Directors may be sued individually or jointly with the company if they do not fulfill their fiduciary obligations. If a director breaches their duty of care and skill to the company, they may be subject to negligence claims. Under common law, directors are obligated to act in the best interests of the company. If they breach this duty, they may be held liable to the company for damages.

*** End of Assessment ***

⁷ Halsbury's Laws of England, Companies (Volume 14 (2016), paras 1–645; Volume 15 (2016), paras 646–1230; Volume 15A (2016), paras 1231–2030), 2. Companies Registered under the Companies Acts