



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 – 45/50 = 90%

QUESTION 1 (multiple-choice questions) [10 marks in total] 8/10 points

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**: 1 point

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 0 point – the correct answer is (a).

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 0 point – the correct answer is (a).

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

Select the correct answer: 1 point

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] 10/10

Question 2.1 [maximum 4 marks] 4 marks

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

[The primary difference is that a Provisional Liquidation is often appointed ex parte, where it is felt that there is an immediate threat to the entity's assets or structure. By contrast an Official Liquidator is appointed at a Court hearing normally due to a significant stakeholder dispute or the entity's insolvency. A provisional liquidator does not assess claims against the company or try to distribute the company's assets to creditors, as the power to realise the assets comes after the court orders a liquidation. The provisional liquidator protects and manages the working and the various assets of the company till the hearing of the winding up of the company. In addition, the provisional liquidator owes fiduciary duties to the company as a controlling agent while acting as an officer of the court. An official liquidation is appointed by the Supreme court of the Bahamas and is responsible for adjudicating the creditors' claims.]

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?

[Local regulators have standing to petition for the winding up of a company who's license or registration has been suspended or revoked. The key circumstances in which a regulator may present a winding-up petition include:

- Non compliance with regulatory requirements: If a company is subject to specific regulatory requirements in the Bahamas, such as financial services regulations, and fails to comply with those requirements, the regulator may seek to wind up the company.
- Public interest: if the regulator believes that the continued operation of the company presents a risk to the public interest a winding up petition could be presented.
- Insolvency: If the company is unable to pay its debts as they fall due the regulator may seek to wind up the company to protect the interests of the creditors.
- Fraudulent behavior or activity: if there is evidence of this a winding-up petition could be presented.]

Question 2.3 [maximum 4 marks] 4 marks

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

[Transactions such as credit and security transactions, may be set aside in cases where they transpired at a time when the company was insolvent in order to give the creditor a preference over the other creditors and, if having transpired within the six months immediately preceding the commencement of a liquidation, this constitutes a voidable preference. The application is made at the instance of the liquidator. Also where a disposition has been made at an undervalue by or on behalf of the company with the intent to defraud its creditors. In this case the application must be made by the liquidator within 2 years of the date of the disposition.]

QUESTION 3 (essay-type questions) [15 marks in total] 13/15

Question 3.1 [maximum 8 marks] 7 marks.

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

[Ancillary orders are orders attached to or required by a sentence or an arrangement in criminal or civil cases. They have different types and purposes, such as protecting individuals or the public, maintaining public order, or imposing compensation or disqualification. They often involve nuanced application of detailed law and vary depending on the situation.

The Bahamian court may make ancillary orders in accordance with section 254 of the Companies Act, such as:

- 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 granting a stay of proceedings or enforcing a judgment against a debtor
- Staying the enforcement of any judgment against a debtor
- Requiring certain persons with information concerning the debtor's business or affairs to be examined or to produce documents
- Ordering the turnover of the debtor's property to the foreign representative.

We can see this in practice in the Judgment of Barnett which outlines how in 2012, the Supreme Court rendered a judgment on the hearing of petitions for the winding up and appointment of official liquidators of two related entities with extensive cross-border dealings. The Supreme Court appointed a foreign court-appointed receiver (who had been appointed by a Federal Court in the US over the debtor's estate in the US) to be official liquidator in the Bahamian liquidation jointly with two Bahamian insolvency practitioners in furtherance of ensuring a co-ordinated and efficient administration of the company's estate.

In the context of turning over assets in Bahamian cross-border insolvency proceedings, in February 2017 the Supreme Court gave its ruling in the matter of Caledonian Bank, in respect of an application under sections 254 and 255 of the Companies Act for the remittance of funds realised in The Bahamas to the principal liquidators in the Cayman Islands.]

Question 3.2 [maximum 7 marks] 6 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.

[The enforcement of a judgment of a court in Bermuda and the enforcement of a judgment of a court in India will be recognised differently. It should be noted that a judgment obtained from a superior court outside the jurisdiction of The Bahamas has no direct operation in The Bahamas. It cannot therefore be immediately enforced by execution in the Bahamas. To have direct operation in The Bahamas, the judgment must first be registered or given recognition by the Bahamian Supreme Court under either statutory or common law requirements.

Statutory registration is generally governed by the Reciprocal Enforcement of Judgments Act 1924 (REJA). The REJA applies only to judgments obtained in the UK and certain commonwealth countries such as Barbados, Bermuda, Jamaica and the BVI, to name a few. India is not included in the REJA Act and so is not recognised, contrary to Bermuda who are included. This means that where the judgment is obtained in a jurisdiction outside of The Bahamas other than those enumerated in the REJA, standard law requirements would regulate the proceedings to recognise that judgment.

If a foreign judgment fails to satisfy the requirements for registration under the REJA, the judgment creditor may commence an action or file a counterclaim in the Supreme Court relying on the judgment debt as the cause of action. In general, the judgment debtor resides outside The Bahamas.

With regards to statutory requirements; under section 3(1) of the REJA, the Supreme Court has jurisdiction and discretion to register a foreign judgment. The section in summary provides where a judgment has been obtained in a superior court outside the Bahamas the judgment creditor may apply to the Supreme Court to have the judgment registered in court, and if it is just and convenient that the judgment should be enforced in the Bahamas, the judgment will be registered.

The Court can however refuse to register a judgment under section 3(2) of the REJA if the original court acted without jurisdiction, the judgment debtor did not voluntarily appear or agree to submit to the jurisdiction of that court or if the judgment was obtained by fraud.

Whether the foreign judgment is recognised under the statutory requirements or as the debt of a Bahamian judgment, it becomes enforceable by the same means available for the enforcement of any Bahamian judgment. The judgment may be enforced under Order 45, rule 1(1) of the Rules of the Supreme Court by a writ of Fieri Facias, garnishee proceedings, a charging order or the appointment of a receiver.]

QUESTION 4 (fact-based application-type question) [15 marks in total] 14/15

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] 6 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.

[The Bahamian Supreme Court has jurisdiction to make winding-up orders under the provisions of the Companies (Winding Up Amendment) Act, 2011. The grounds and procedures for winding up a company in The Bahamas is laid out in the Act. A new Part VIIA (entitled "International Cooperation") replaced the provisions contained in Part VII (entitled "Winding Up of Companies") which came into effect in April 2012. A winding up petition can be filed on the ground that the company is insolvent, as it appears that it has been insolvent since June 2022 due to the significant losses and misappropriation of funds by the finance manager, Giovanni Wilson. The loan agreement and the responsibilities laid out in it that the directors clearly did not meet shows there is a valid ground for seeking the winding up of the company's affairs. The Bahamian Supreme Court has jurisdiction to make winding-up orders for companies incorporated in the BVI under the principle of the "winding-up jurisdiction". This grants the court authority to wind up BVI companies that conduct business within its jurisdiction. With regards to Supreme Company Limited; they conducted business in the Bahamas, and traded in the Caribbean and South American markets, meaning that it is within the scope of the Bahamian Supreme Court's winding-up jurisdiction.]

The petitioners could be any one of the following:

- Company itself – the Board of directors could potentially file a petition
- Shareholders – If the company is not acting in the best interests of the shareholders then a petition can be filed by a shareholder
- Creditors – As the company has failed to pay its debts, a creditor such as John Smith or Robert Lewis can file a winding up petition.

A key element to note is that a creditor is not precluded from filing a petition for the winding-up of a company, if it did not in the first instance, serve the company with a statutory demand.

A winding-up petition is usually determined within 6 months of its filing, unless the court is satisfied that particular circumstances justify an extension of such time. After a winding up petition is filed and before a winding up order is made, an application for a moratorium or stay of proceedings against the company may be made by the company or any creditor or contributor.]

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 could be held liable for the company's insolvency and failure to act on Mr Wilson's misappropriation of the BSD \$500k, as directors they have certain duties and responsibilities

to act in the best interests of the company and its shareholders. The fact they have failed to address and take action on the back of Mr Wilsons misconduct in itself could give rise to potential liability.

The directors of the company owe a fiduciary duty to act in good faith and in the best interests of the company. They are expected to exercise reasonable care and to be diligent when it comes to their duties and carrying them out. As the directors allowed the company to continue trading while insolvent (unable to pay its debts), they could be held responsible for the company's debts incurred during that period.

The directors could be personally liable as the Bahamas recognises the concept of wrongful trading. Under the Companies (Winding Up Amendment Act), if the court finds that a director knew or ought to have known that the company was unable to pay its debts, and that the director did not make every step possible to minimize creditor losses, then the court may order the director to make a contribution to the company's assets. Also the director may be ordered by the court to repay, restore or account for any money or property improperly applied or retained by the director. Director liability is a complex area, it requires an in-depth examination of all the facts and circumstances and the directors should seek legal advice in order to have a better understanding of their legal obligations and potential liabilities under the legislation.]

*** End of Assessment ***