



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8F**

**NEW ZEALAND**

***This is the*** summative (formal) assessment ***for*** Module 8F ***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 8F. ***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.assessment8F]. An example would be something along the following lines: 202223-336.assessment8F. 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 "student number" 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

22/50

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: **1**

**If a creditor is dissatisfied with the Official Assignee or Liquidator's decision in respect of its proof of debt, the creditor may:**

- (a) Challenge the decision through an application to the ITS or MBIE.**
- (b) Apply to the Official Assignee or Liquidator for the decision to be reversed or modified.**
- (c) Bring court proceedings for a money judgment in respect of the debt.**
- (d) Apply to the court for the decision to be reversed or varied.**

Question 1.2

**Which of the following is not a collective insolvency process: **1****

- (a) Receivership.**
- (b) Liquidation.**
- (c) Deed of company arrangement.**
- (d) Voluntary administration.**

Question 1.3

Select the correct answer: 0

**Voluntary administration is not used for the following reason(s):**

- (a) **Maximisation of the company's prospects of trading through and/or continuing in existence.**
- (b) **To enable a Deed of Company Arrangement to be entered into for the benefit of creditors.**
- (c) **To minimise tax liability by giving the Inland Revenue Department preferential status.**
- (d) **Enable the company to be administered in such a way to provide a better return to creditors than they would otherwise receive by way of an immediate liquidation.**

Question 1.4

Select the correct answer: 0

**A receiver:**

- (a) **is an agent of the secured creditor that appointed the receiver.**
- (b) **owes a duty of care to unsecured creditors.**
- (c) **is an agent of the company and not of the secured creditor that appointed the receiver.**
- (d) **is an agent of the company until the appointment of a liquidator to the company.**

Question 1.5

Select the correct answer: 1

**Company A goes into liquidation. It has a secured creditor who has security over all present and after acquired property, including accounts receivables and inventory. There are insufficient amounts to meet all creditor claims. Which of these claims would be last in priority?**

- (a) **PAYE owed to the Inland Revenue.**
- (b) **Employee claims.**
- (c) **The Liquidator's costs and expenses.**
- (d) **Costs of the creditor who applied to put the company into liquidation.**

**(e) The secured creditor.**

Question 1.6

Select the correct answer: 0 - a financing statement can be registered to perfect an interest, however perfection can also be achieved by possession. A financing statement otherwise determines the order of priority between competing interests, depending on timing of registration (first in time wins).

**Assuming attachment has occurred, a financing statement:**

**(a) creates a security interest which gives a creditor priority over other creditors.**

**(b) is registered by the debtor on the Personal Property Securities Register to perfect a security interest.**

**(c) is the only way perfection of a security interest can be effected.**

**(d) will determine the order of priority between competing security interests, based on time of registration**

Question 1.7

Select the correct answer: 0

**Liquidators in New Zealand: Liquidators can also be appointed by shareholders of a company. They are not agents of the appointing creditor (receivers). They also act in the interests of unsecured creditors.**

**(a) can only be appointed by the Court as they are officers of the Court.**

**(b) can be appointed by creditors at a Watershed meeting.**

**(c) act as agents for the appointing creditor.**

**(d) protect the interests of all creditors of the company.**

Question 1.8

Select the correct answer: 1

**A voluntary administrator must convene and hold a first meeting of creditors within how many business days of his appointment?**

**(a) 3 business days.**

**(b) 8 business days.**

(c) 12 business days.

(d) 24 business days.

(e) 45 business days.

Question 1.9

Select the correct answer: **0 - secured creditors are bound by administration unless they elect to enforce their rights within 10 working day window.**

**Secured creditors in New Zealand:**

(a) have absolute rights ahead of other unsecured creditors.

**(b) stand outside the liquidation or administration of a company.**

(c) have exclusive rights to appoint a receiver.

**(d) have 10 working days within which they must elect to enforce their rights under the voluntary administration regime.**

Question 1.10

Select the correct answer: **1**

**A monetary debt judgment obtained from an Australia High Court may be enforced in New Zealand under the:**

(a) **Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.**

(b) **Reciprocal Enforcement of Judgments Act 1934.**

**(c) Trans-Tasman Proceedings Act 2010.**

(d) **Common law.**

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 5 marks] **2.5**



**Name the different types of voidable transactions that can be avoided by a liquidator and indicate whether the company needs to have been insolvent at the time of the transaction, or become insolvent upon entering into the transaction.**

Answer:

The voidable transactions are:

Voidable (insolvent) transactions – **Must should unable to pay due debts at time of transaction. Rebuttable presumption of insolvency if within 6 months. 2 years for related parties. Cashflow focus, though balance sheet is relevant**

Voidable charges – **Must show company became insolvent as result of charge.**

Transactions at undervalue.

Transactions for inadequate or excessive consideration with directors and other persons

Charges entered into with related parties. **No requirement of insolvency in respect of related party transactions.**

The liquidator has several statutory powers to investigate and pursue transactions occurring in the period immediately prior to liquidations. The liquidator must indicate that the company was insolvent at the time of the transaction.

**Question 2.2 [maximum 3 marks] 1.5**

***In what way can receivership come about in New Zealand? In whose interests does the receiver act? From where does the receiver's powers derive?***

Answer:

A receiver is normally appointed by a secured creditor in respect of a secured property. On very rare occasions a receiver can be appointed over a person. The greater part of appointments is due to private appointments by a secured creditor in respect of a contractual right under a security agreement. No court approval is necessary in the appointment of a receiver as long as it is in writing and all the condition under the contractual terms have been met. Only receivers that are licensed and are entitled to act as receivers in accordance with the IPRA can be appointed.

The receiver acts in good faith for the purpose he was appointed and in the best interest of the person in whose interest he has been appointed. This would be in the interest of the secured creditor who appointed the receiver.

A receivers powers derives from the Receiverships Act and is set out in contractual terms under which he was appointed.

**Though rare, receivers can also be appointed by the Court in NZ. These receivers are also bound by Receiverships Act and will have overlaying obligations with respect to the Court order. Can be required to act in interest of appointing creditor (subject to Court order).**

**Question 2.3 [maximum 2 marks] 1**

**Name the options available to creditor who has obtained a judgment outside of New Zealand who wishes to enforce the judgment in New Zealand. What role does the New Zealand court play in this process?**

**Answer:**

The options available are:

1. Enforcement under the Reciprocal Enforcement of Judgments Act 1934;
2. Enforcement under the Enforcement of Commonwealth Judgments under Senior Courts Act 2016
3. Enforcement under the Trans-Tasman Proceedings Act 2010 ; and
4. Enforcement under common law.
5. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards
6. UNCITRAL Model Law on Recognition and Enforcement of Insolvency Related Judgments however not yet adopted by New Zealand.

The role of the Senior courts is to provide for the enforcement in the High Court of a monetary judgment of any commonwealth court (Senior Courts Act 2016 (SCA))

**QUESTION 3 (essay-type questions) [15 marks in total] 5/15**

**Voluntary administrations have not received significant traction in New Zealand. Discuss potential reasons for this, having regard to the process and New Zealand's commercial context. In what circumstances would you advise a company to consider voluntary administration? Name 2 considerations which would influence this advice and explain why.**

**Answer:**

Voluntary administration is a formal insolvency procedure set out in the Companies Act of 1993. The objective of the Act was to assist the administration of the affairs of an insolvent company or a company that might become insolvent in the near future thereby preserving the existence of the company.

Voluntary administration however was not very popular as its success rate was very low. **Yes, but why?** It is an expensive process, **Yes – procedural requirements make it expensive, and unsustainable with smaller entities.** and the directors would no longer have control over the company. The control of the company would vest in the administrator who is obligated to act in the best interest of the creditors. The administration provides a moratorium or stay on creditors initiating proceedings against the company. It provides a breathing space for the company to recover and rehabilitate. This stay is not automatic and must be obtained in an application to the High Court. The stay does not apply to secured creditors wanting to recover debt. **The moratorium applies to secured creditors unless they act within 10 working days.** The cost in defending a stay against creditors resulted in the rehabilitation process not being used and ineffective.

**Moratorium is automatic, with limited exceptions, including against those creditors who have taken action prior to VA.**

As a preferential creditor, the Inland Revenue's priority over a debtor company's "accounts receivable" extends to almost any monetary obligation outstanding on the date of receivership or liquidation. Voluntary administrators incur personally liable for GST and GST made on supplies before the appointment of the voluntary administrator remains the liability of the company and Inland Revenue remains a preferential creditor. **IRD does not have preferential status in VA. Accordingly, it has no incentive to support a VA.**

I would advise companies to opt for voluntary administration where their Creditors are about to act against the company or attach the company's property. When a company is under administration a stay or moratorium on all action against the company and its property is implemented thereby affording the company a breathing period to reorganise. The company has two options: a deed of company arrangement or DOCA is executed, and the administration ends, or the company is wound-up. If a DOCA is executed, it is binding on all creditors and officers of the company, irrespective if a creditor agreed to the DOCA or not.

#### **Practical considerations when looking at VA:**

- **What is the financial position of the entity? Is a restructure/refinance/sale feasible?**
- **Is there support from secured lenders? If not, unlikely to work as they can simply enforce.**
- **Are there personal guarantees from directors?**
- **What enforcement steps have been taken? Are the steps in respect of critical assets (eg a lease?) If so, VA unlikely to work**
- **What is the size of the business? Smaller businesses unlikely to be able to sustain costs of VA.**
- **What is the percentage of supportive creditors? Have you got majority in number and 75% value in debt? DOCA will need to be voted on, so supporting creditor number is important.**

QUESTION 4 (fact-based application-type question) [15 marks in total] **7/15**

**Mr Strong was born in the UK but has travelled between the United Kingdom and New Zealand for most of his adult life as he has family and business interests there. He rented while he lived in the UK. He has bank accounts in both the United Kingdom and New Zealand.**

**He worked in the UK for a number of years, but he decided he wanted to return to New Zealand. He sold his business in the UK and moved back to New Zealand. About two years later, proceedings were issued in the United Kingdom pursuant to a guarantee against Mr Strong. The creditor obtained judgment for £500,000 and subsequently petitioned for Mr Strong's bankruptcy in the United Kingdom. Ms Finder was appointed trustee of the bankrupt estate.**

**Mr Strong had £5,000 in his bank account in the United Kingdom. Otherwise, Ms Finder was unable to uncover any other assets in the United Kingdom which could be realised for the benefit of creditors. She did discover however that Mr Strong owned**

**some property in New Zealand. Mr Strong had stopped working for about a year before he moved back to New Zealand.**

Question 4.1 [maximum 8 marks] **4/8**

**What options are available to Ms Finder to recover property located in New Zealand?**

**Answer:**

The courts in New Zealand have already dealt with a similar matter in *Williams v Simpson* [2011] 3 NZLR 380 for purposes of “centre of main interest” or COMI under the cross-border Act. Compliance under Article 16 of the Model Law that the debtor’s office, or habitual residence (in a case of an individual) is presumed to be the centre of the debtor’s main interest. It is quite clear from the facts above that Mr Strong’s COMI is in New Zealand therefore Ms Finder will have to apply for an order to the Court in New Zealand under the Cross-Border Act, for recognition of the English bankruptcy as a foreign main proceeding or foreign non-main proceeding. The decision is clear in the *Williams v Simpson* matter, and applicable to this matter, that the Court will not recognise the English bankruptcy as a foreign main proceeding as there was no evidence at that time that Mr Strong had an office or residence in England to carry out his economic activity.

What is evident however is that an application for an order of assistance can be made to the Court in New Zealand under section 8 of the Cross-boarder Act for an interim search-and -seizure order that certain property of Mr Strong in New Zealand can be seized. The Courts have ruled that under Article 8 of the Cross Border Act the New Zealand Courts have jurisdiction to provide assistance to the English Courts thereby permitting Ms Finder to realise Mr Strong’s assets in New Zealand.

To place emphasis on the judicial decision making in Cross Border Insolvency matters the court decision on the matter of *Re HIH Casualty and General Insurance Ltd* stated that cooperation between English Courts and in this case New Zealand courts, as far as justice and public policy is concerned, assist to ensure that the assets of the company are realised and distributed under a single system to all creditors.

Therefore, Mr Strong’s assets and liabilities situated in New Zealand will be administered in New Zealand through the assistance and recognition under the UNCITRAL Model or alternatively under the rules of private international law.

**What factors would the Court consider when assessing whether to recognise the bankruptcy in New Zealand?**

- **Is there a foreign representative? Yes**
- **Is there a foreign proceeding? Yes - bankruptcy is a collective proceeding.**
- **Is it a foreign main proceeding, or non-main proceeding? Where is the habitual place of residence of Mr Strong? Does the presumption apply in this case? Is there some form of economic activity in the UK which might suggest Mr Strong is still trading from the UK?**
- **If neither, what other options are available? Would Article 8 assist as in *Williams*?**

**Answer:**

The bankruptcy occurred in the UK and the realisation of assets is in New Zealand. For the New Zealand Courts to recognise the English bankruptcy the following Articles in the Model Law are of importance:

Article 16 Presumptions concerning recognition.

Article 17 – Decision to recognize a foreign proceeding.

Article 19 – Relief that may be granted upon application for recognition of a foreign proceeding.

Article 20 – Effects of recognition of a foreign main proceeding.

Article 21 – Relief that may be granted upon recognition of a foreign proceeding.

Article 22 – Protection of creditors and other interested persons.

**Question 4.2 [maximum 7 marks]**

**Question 4.2.1 [maximum 4 marks] 2/2**

**What options are available to Ms Finder to:**

**(a) Find out further information about Mr Strong's affairs, if she believes she has insufficient information.**

**(b) Assuming she has reliable information about concealed assets, what steps could she take to protect those assets?**

**Answer:**

- **To obtain information about immovable property owned by Mr. Strong, Ms. Finder can visit the Land Information New Zealand data service to search for real property.**
- **Seek assistance from High Court under s 8 of the Insolvency (Cross Border) Act - request foreign Court to issue request for assistance - apply to NZ Court to act in aid of UK Court. Search and seizure (as noted above)**
- **Article 19 and 21(1)(d) Schedule 1 - information seeking/investigate affairs of Mr Strong to locate assets. Seek interim orders if necessary to prevent enforcement action against assets and/or vest assets in Ms Finder to preserve them if waiting for recognition application to be heard.**

When Ms Finder files her application for recognition (Article 17 of the Model Law) she must also apply in terms of Article 19, 20 and 21 of the Model Law, for relief. This will ensure protection on the assets of Mr Strong and or the interest of the creditors. This will ensure a stay of execution on Mr Strong's assets and protect and preserve the value of assets if in jeopardy this may afford Ms Finder the opportunity to investigate the affairs of Mr Strong or find any concealed assets. Ms Finder can also apply for the modification of the stay and request specific relief under Article 21 of the Model Law. In terms of Article 21(d) relief may be granted upon recognition of a foreign proceeding by providing Ms Finder for the examination of witnesses, taking of evidence or information regarding Mr Strong's assets, affairs, rights, obligations and liabilities.

Ms Finder can seek Statutory assistance under Section 135 of the Insolvency Act 1967 to stay any other execution against Mr Strong in respect of his property or person or for any other execution on the same bases to be permitted.

Question 4.2.2 [maximum 3 marks] 1/3

***Do you think an application for recognition would be successful? Explain why or why not?***

**Answer:**

Yes, I do think the application for recognition will be successful. In the matter between *Kim v STC Ocean Co Ltd* it was stated when applying for an automatic stay under Article 20(1) of the Model Law a Court has a broad discretion to grant leave in appropriate situations to grant the same protection to creditors they would have had under their own domestic laws. Section 22 of the Model Law states that as long as there is a balance between the relief seek by the foreign representative and the interest of the creditor's relief may be granted as requested.

**\* End of Assessment \***