



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).**
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- 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

43.5/50

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

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

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: **1**

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: **1**

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: **0**

(e) Schedule 7(2) of the Companies Act provides that a secured creditor's claim, in so far as they are over accounts receivable or inventory, rank behind those in clause 1, where there are insufficient assets to pay out the claims in clause 1 in full.

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: **(d) - 0** The security interest is not created by the registration of the financing statement. The security interest is created by the underlying contract in which security is granted

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 effected.

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

Question 1.7

Select the correct answer:

Liquidators in New Zealand: 1

(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:

A voluntary administrator must convene and hold a first meeting of creditors within how many business days of his appointment? 1

- (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: **1**

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] **8.5/10**

Question 2.1 [maximum 5 marks] **3.5/5**

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.

In order to indicate whether a company needs to have been insolvent at the time of the transaction, or become insolvent upon entering into the transaction, it is important to look at what it means to be insolvent. The Companies Act of 1993 does not define "insolvent", however it does contain a solvency test in Section 4 thereof. In terms of Section 4(1), a company satisfies the solvency test if -

- (a) The company is able to pay its debts as they become due in the normal course of business; and*
- (b) The value of the company's assets is greater than the value of its liabilities, including contingent liabilities.*

It therefore follows that a company does not satisfy the solvency test, and is insolvent, when the contrary is true -

- (a) The company is unable to pay its debts as they become due in the normal course of business; and*
- (b) The value of the company's liabilities is greater than the value of its assets, including contingent liabilities*

Good. In the context of voidables, there is a broader focus on the cashflow position of the company, rather than the balance sheet position, though both are ultimately relevant to the Court's assessment.

*In the framework of what has been stated above, the following are the types of voidable transactions provided for in the Companies Act: **Note: Restricted period (6 months prior to liquidation) and (rebuttable) presumption that company is unable to pay debts at time of transaction. This applies to both transactions under s 292 and 293 of the Act.***

- 1. Insolvent transactions - in terms of Section 292(2)(a) of the Companies Act an insolvent transaction is entered into at a time when the company is unable to pay its due debts and therefore the company needs to have been insolvent at the time of the transaction.**
- 2. Voidable charges - in terms of Section 293(1)(b) and 293(1AA)(b) of the Companies Act a charge over any property or undertaking of a company is voidable if immediately after the charge was given, the company was unable to pay its due debts and therefore the company needs to become insolvent upon entering into the transaction.**
- 3. Transactions at undervalue - in terms of Section 297(2)(b) of the Companies Act a liquidator may recover from a person if either the company was unable to pay its due debts when it entered into the transaction, or the company became unable to pay its due debts as a result of entering into the transaction, therefore the company**

can either be insolvent at the time of the transaction or become insolvent as a result of the transaction.

4. Transactions for inadequate or excessive consideration with directors, relatives or a related company - ***there is no requirement in terms of Section 298 of the Companies Act that a liquidator must prove that the company was insolvent at the time of the transaction.***
5. Charges entered into with related parties - ***there is no requirement in terms of Section 299 of the Companies Act that a liquidator must prove that the company was insolvent at the time of the transaction.***

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

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?

A receivership in New Zealand can come about in two ways:

1. *An order of the High Court after a party seeking the appointment of a receiver approaches the court and applies to the High Court for an order appointing a receiver ("court-appointed receiver");*
2. *A private appointment made by a secured creditor in accordance with a contractual right granted under a security agreement ("privately appointed receiver").*

A court-appointed receiver does not answer to the debtor party or creditors, unless ordered to do so by the Court and he / she must act impartially and in accordance with the Court's directions.

In terms of Section 18(2) of the Receiverships Act of 1993, a receiver (both court- and privately appointed) is obliged to act in the best interests of the person in whose interest he / she was appointed ("appointing party").

In terms of Section 14(1) of the Receiverships Act, a court-appointed receiver derives his / her powers from the order granted and under which the appointment was made. The appointment will be made for a specific purpose and the powers will be granted as necessary to enable the receiver to meet the said purpose.

In terms of Section 14(1) of the Receiverships Act of 1993, a privately appointed receiver derives his / her powers from the deed or security agreement under which the appointment was made.

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

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?

Judgments obtained outside of New Zealand do not have direct force in New Zealand, however these judgments can be enforced in New Zealand by way of the following four methods of enforcement:

- 1. Under the Reciprocal Enforcement of Judgments Act 1934 - the New Zealand High Court will register a foreign judgment granted by a senior court upon application by the party wishing to register the judgment. Once the judgment is registered by the New Zealand High Court, it has the same force and effect as a judgment granted by the New Zealand High Court itself and will carry interest;*
- 2. Under the Enforcement of Commonwealth Judgments Under Senior Courts Act 2016 - a person who obtained a money judgment in a Commonwealth Court can file a memorial authenticated by the said Commonwealth Court in the New Zealand High Court. The New Zealand High Court can summon the judgment debtor and allow them an opportunity to give reason as to why the judgment should not be executed. If the judgment debtor does not appear or does not give sufficient reasons for not executing the judgment, the High Court will register the judgment and it will become absolute;*
- 3. Under the Trans-Tasman Proceedings Act 2010 - judgments granted in any Australian Court can be registered by the New Zealand Court that has the power to give relief in the judgment, being either the District Court or if it does not have the necessary power, the High Court;*
- 4. Under common law - judgments from countries with no reciprocal arrangements for enforcement with New Zealand have to be enforced in New Zealand under the common law. Under the common law new summary judgment proceedings have to be issued in the New Zealand courts which proceedings are based on the foreign judgment. Once judgment is obtained, it is enforceable in New Zealand and the judgment creditor can utilise the available domestic enforcement methods.*

The method used will depend on the country in which the judgment was granted, the date of the judgment and the subject matter thereof.

QUESTION 3 (essay-type questions) [15 marks in total] **12/15**

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.

In terms of Section 239A of the Companies Act 1993, the objects of voluntary administration ("VA") are to provide a process through which the business, property and affairs of an insolvent company, or a company that may become insolvent in the future, can be administered in a way that:

- 1. maximises the chances of the company, or as much of the business of the company as possible, to continue to exist; or*
- 2. if it is not possible for the company or a portion of its business to continue to exist, to ensure that a better return is achieved for the company's creditors and*

shareholders than the return that would be achieved if the company was liquidated.

VA is used less frequently in New Zealand than other insolvency procedures are. The reasons for this are potentially the following:

1. Costs of a VA and New Zealand's commercial context -
New Zealand's economy is largely dominated by small and medium enterprises ("SME's"). A VA is a costly process, as the administrator may charge professional fees. These fees may be high, as an administrator is held personally liable for certain costs relating to the administration that is undertaken. These costs are:

- 1.1. *General debts in terms of Section 239ADH of the Companies Act, which general debts include debts incurred in the performance or exercise of the administrator's functions and powers as such, for the purpose of funding the company, services rendered, goods bought or property hired, leased or occupied;*

- 1.2. *Rent and other payments in terms of Section 239ADI of the Companies Act, which rent and payments are due by the company under an agreement for the use, possession or occupation of property entered into before the commencement of the administration (Section 239ADI(1)), and rent and other payments that accrue in the administration period (Section 239ADI(2)).*

These costs may be more than an SME that is already in financial distress can carry and therefore it might be more cost-effective for an SME to consider liquidation, as a liquidator will trade for a shorter period and wind down the business faster than an administrator, which will limit costs.

SME's will therefore choose not to use VA in circumstances where they are in financial distress. VA will however be utilised more by larger businesses who have substantial assets to cover the costs of VA.

Yes - the costs are usually elevated due to the procedural requirements of a VA, including the convening of meetings (initial meeting and watershed meeting) and exploratory measures (undertaken to assess whether a DOCA is appropriate).

2. Lack of support by creditors / New Zealand's Inland Revenue Department ("IRD")

The New Zealand IRD does not enjoy a preferential status in the process of VA, which preferential status they do enjoy under liquidation in terms of Schedule 7 of the Companies Act. As a result of the lack of preferential status, the IRD will be less likely to vote in support of a deed of company arrangement ("DOCA") where there are debts due and payable to them. The IRD will rather opt for liquidation proceeding where their claim enjoys a preferential status.

Fully secured creditors normally utilise Receivership procedures, which ensures that a faster return to the secured creditor of as much as possible of the amount that is due and payable to them. A VA will most likely take longer to finalise and also diminish the assets of the company which remain available to settle the debt

of the company, which in turn will result in a lower amount that is payable to the secured creditor. Secured creditors will therefore only vote in favour of a DOCA where they are confident that they will receive a better return than the return that would be achieved if a receiver was appointed or if the company was liquidated.

There must be at least a prospect of getting creditors' support and votes in favour of a VA, as for a DOCA to be approved, 75% of the creditors in value and 50% of the creditors by number, as well as a special resolution by the directors / shareholders are required. If creditors are not confident that they will receive a better return than the return that would be achieved if the company was liquidated, they will not vote in favour of the DOCA.

VA will, with reference to what has been stated hereinabove, therefore be advisable as a better solution than other insolvency procedures if:

- 1. There is a possibility of the company, or as much of the business of the company as possible, to continue to exist and for the business, or a portion thereof, to be preserved;*
- 2. There is a reasonable prospect that the majority of the creditors will be convinced by way of a reasonable proposal that a better return is achievable for the company's creditors and shareholders in VA than the return that would be achieved if the company was liquidated.*

VA will further be advisable if:

- 1. The company is financially distressed and insolvent, or may become insolvent in the near future but the shareholders do not want to commence insolvency procedures, as Directors:*
 - 1.1. have a duty to act in good faith and in the best interests of the company (Section 131 of the Companies Act); and*
 - 1.2. must not agree to the business of the company to be carried on in a way that may likely create substantial risk of serious loss to the company's creditors (Section 135(1) of the Companies Act); and*
 - 1.3. Must not cause or allow the business of the company to be carried on in a way that may likely create substantial risk of serious loss to the company's creditors (Section 135(2) of the Companies Act).*

Therefore, if the company is trading in insolvent circumstances or in circumstances where it may become insolvent if it continues trading in the same manner, Directors have a duty to take the necessary steps to minimise the risks of serious loss to creditors and to act in the best interests of the company. If the shareholders do not wish to commence other insolvency procedures available to it, as there is a reasonable prospect of the company, or a portion thereof, being saved, VA will be the advisable process to follow.

Because a VA is about maximising the prospects of ongoing trading (i.e. avoiding liquidation if possible), the financial status of the entity is an important consideration. VA is generally only going to work if it is still financially feasible for ongoing trading to occur. Early intervention is therefore critical.

2. *One or more of the creditors are threatening to apply for the appointment of a liquidator or receiver, or threatening or commencing execution or other legal collection procedures, but there is still support from the majority of the creditors or a reasonable prospect that the majority of the creditors will support VA.*

On the commencement of the VA process and the appointment of an administrator, a moratorium arises, which provides the company with relief from the abovementioned enforcement actions being taken by creditors. All enforcement actions against the company or its property are suspended unless the administrator consents to the action or the Court gives its permission. The enforcement actions that are suspended includes proceedings against the company, recovery of leased property and enforcement of a charge against a company or trade asset of the company. The ultimate benefit of VA is therefore to, by way of the moratorium, provide a company with an opportunity to ascertain whether the company can be saved by restructuring its debt and to trade out of insolvent / financially distressed circumstances and to ultimately continue in existence.

*The moratorium is unfortunately not absolute as secured creditors with security over the majority of the assets of the company retain their enforcement rights for a period of time. Therefore, if the majority of the company's assets form part of the security of creditors, their support will be required. **The support of secured creditors who have security over the whole, or substantially the whole of the company's assets, should be considered. Their support is generally critical to the process.***

Also consider:

- **Are there personal guarantees in place from the directors?**
- **Have any creditors taken enforcement steps prior to the appointment? How will the business be affected if enforcement occurs (for example: if a landlord has taken steps already, what are the prospects of staying the action? How critical is the lease to the business operations?)**

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

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] **8**

(a) What options are available to Ms Finder to recover property located in New Zealand?

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

(a) Ms. Finder must first apply in terms of Article 15 of Schedule 1 of the Insolvency Crossborder Act 2006 to the High Court in New Zealand for recognition of the foreign proceeding (bankruptcy) as granted in the UK and in which she is appointed.

Once an application for recognition has been filed, Ms. Finder can file an application in terms of Article 19 of Schedule 1 of the Insolvency Crossborder Act for pre-recognition relief to protect the assets of the debtor or the interests of the creditors. The pre-recognition relief that can be granted includes in terms of Article 19(1) inter alia:

- 1. Staying execution proceedings;**
- 2. Entrusting the administration or realisation of the Mr. Strong's assets (or a part thereof) located in New Zealand to Ms. Finder as the foreign representative, so as to protect and preserve Mr. Strong's assets that are perishable, at the risk of decreasing in value or in jeopardy in the period between the filing of the application for recognition and the hearing of the application;**
- 3. Suspending the right to transfer, encumber or dispose of Mr. Strong's assets as mentioned in Article 21(1)(c);**
- 4. Providing for the examination of witnesses, taking of evidence or delivery of information in relation to the debtor's financial affairs, including assets, liabilities, rights and obligations as mentioned in Article 21(1)(d).**

(b) In terms of Article 17 of Schedule 1 of the Insolvency Crossborder Act and subject to the question as to whether the granting of the relief sought (recognition of the foreign liquidation proceedings) would be contrary to the public policy of New

Zealand as per Article 6 of Schedule 1 of the Insolvency Crossborder Act, a foreign proceeding shall be recognised if the following factors are present:

- 1. The foreign proceeding (bankruptcy) is a foreign proceeding as defined in Article 2(a) of Schedule 1 of the Insolvency Crossborder Act, being “a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation”;*
- 2. The foreign representative who is applying for the recognition of the foreign bankruptcy (Ms. Finder) is a person as defined in Article 2(d) of Schedule 1 of the Insolvency Crossborder Act, being “a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding”;*
- 3. The application meets the requirements set out in Article 15(2) of Schedule 1 of the Insolvency Crossborder Act in that the application is accompanied by the following documents:*
 - 3.1. A certified copy of the foreign court order commencing the foreign bankruptcy and appointing the foreign representative; or*
 - 3.2. A certificate from the foreign court affirming the existence of the foreign proceeding and the appointment of the foreign representative; or*
 - 3.3. In the absence of the documents referred to in 3.1 and 3.2 above, any other evidence acceptable to the Court of the existence of the foreign proceeding and the appointment of the foreign representative.*
- 4. The application is submitted to the High Court in New Zealand.*

Question 4.2 [maximum 7 marks] **7**

Question 4.2.1 [maximum 4 marks]

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?**
- (a) To obtain information about immovable property owned by Mr. Strong, Ms. Finder can visit the Land Information New Zealand (“LINZ”) data service to download data about property title, owners and title memorials.*

To obtain more information about both immovable and movable assets and if an application for recognition has not yet been filed, foreign insolvency practitioners can seek assistance from the High Court in New Zealand. In terms of Section 8 of

the Insolvency Crossborder Act, read with Article 1(a) of Schedule 1 of the said Act, a foreign court or a foreign representative (Ms. Finder) can seek assistance in New Zealand in connection with a foreign proceeding. Ms. Finder can therefore request the UK High Court to issue a Letter of Request to the New Zealand High Court seeking assistance. The High Court in New Zealand may, if it thinks fit, act in aid of and assistance to the foreign court in relation to the foreign proceeding. In acting as such, the High Court in New Zealand may exercise the powers that it could exercise in respect of the matter as if it had arisen within its own jurisdiction. Ms. Finder can for example apply for interim search-and-seizure warrants to search for and seize property of Mr. Strong in New Zealand.

Once an application for recognition has been filed by Ms. Finder, she can file an application in terms of Article 19 read with Article 21(1)(d) of Schedule 1 of the Insolvency Crossborder Act for pre-recognition relief to be granted in terms whereof witnesses can be examined, evidence can be taken or information can be delivered in relation to Mr. Strong's financial affairs, including assets, liabilities, rights and obligations to enable her to investigate the affairs of Mr. Strong and locate assets.

(b) Once an application for recognition has been filed by Ms. Finder, she can file an application in terms of Article 19, of Schedule 1 of the Insolvency Crossborder Act for pre-recognition relief to be granted in terms whereof:

- 1. execution against Mr. Strong's assets can be stayed;*
- 2. the administration or realisation of the debtors' assets (or a part thereof) located in New Zealand will be entrusted to Ms. Finder, so as to protect and preserve the assets of the Mr. Strong that are perishable, at the risk of decreasing in value or in jeopardy in the period between the filing of the application for recognition and the hearing of the application;*
- 3. the right to transfer, encumber or dispose of assets of the debtor is suspended as mentioned in Article 21(1)(c);*

Relief granted under the abovementioned Article will terminate once the application for recognition is decided upon.

If an application for recognition is granted, Ms. Finder can file an application in terms of Article 21, of Schedule 1 of the Insolvency Crossborder Act for post-recognition relief to be granted in terms whereof:

- 1. the commencement or continuation of individual actions or individual proceedings concerning the Mr. Strong's assets, rights, obligations, or liabilities are stayed, to the extent they have not been stayed under Article 20(1)(a);*
- 2. execution against Mr. Strong's assets is stayed to the extent that it has not been stayed under Article 20(1)(b);*
- 3. the right to transfer, encumber, or otherwise dispose of any assets of Mr. Strong is suspended to the extent this right has not been suspended under Article 20(1)(c);*

4. the administration or realisation of the debtors' assets (or a part thereof) located in New Zealand is entrusted to Ms. Finder;

If an application for recognition is not granted, in terms of Section 8 of the Insolvency Crossborder Act, read with Article 1(a) of Schedule 1 of the said Act, a foreign court or a foreign representative can seek assistance in New Zealand in connection with a foreign proceeding. Ms. Finder can therefore request the UK High Court to issue a Letter of Request to the New Zealand High Court seeking assistance. Ms. Finder can for example apply for assistance in terms whereof she will be enabled to attach and realise the assets found in New Zealand.

Question 4.2.2 [maximum 3 marks]

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

In considering what is stated hereinabove under 4.1 with reference to the factors that have to be considered in terms of Article 17 of Schedule 1 of the Insolvency Crossborder Act when assessing whether to recognise the bankruptcy in New Zealand, the bankruptcy proceedings in the UK will be considered a foreign proceeding, as it meets all the requirements listed in the definition thereof. Ms. Finder will further be considered a foreign representative, as she was appointed in the UK as Trustee and therefore authorised to administer the insolvent estate of Mr. Storm.

The English bankruptcy is therefore capable of being recognised by the High Court in New Zealand.

The foreign proceeding will be recognised as a foreign main proceeding if Mr. Strong has his centre of main interest ("COMI") in the foreign state where the foreign proceedings were opened (UK) and as a foreign non-main proceeding if he only has an establishment (defined in Article 2(f) of Schedule 1 of the Insolvency Crossborder Act as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services") in the UK where the foreign proceedings were opened.

The term COMI is not defined in the Insolvency Crossborder Act, however in terms of Article 16(3) of Schedule 1 thereof, it is presumed that, in the absence of proof to the contrary, a debtor's COMI is the debtor's habitual residence in the case of an individual.

There are relevant factors that must be considered when the COMI of a debtor is being determined:

- 1. Location of Mr. Storm's habitual residence - New Zealand;*
- 2. Location of Mr. Storm's primary assets (he only has a bank account in the UK) - New Zealand;*

Based on all of the above, Mr. Storm's COMI is situated in New Zealand and the UK bankruptcy cannot be recognised as a Foreign Main Proceeding in terms of Article 17(2)(a) of Schedule 1 of the Insolvency Crossborder Act.

As Mr. Storm's COMI is in New Zealand, the Court will consider whether Mr. Storm has an establishment in the UK to ascertain whether the UK bankruptcy can be recognised as a foreign non-main proceeding in terms of Article 17(2)(b) of Schedule 1 of the Insolvency Crossborder Act.

In the High Court decision of Williams v Simpson (High Court Hamilton CIV -2010-419-1174, 12 October 2010), the High Court in New Zealand held that the definition of "establishment" was expressed in the present tense and therefore Mr. Storm must, at the date of the application for recognition, still carry out a form of trade by human means and services.

Although Mr. Storm worked in the UK for a number of years, he sold his business in the UK and moved back to New Zealand two years ago. He holds a bank account in the UK, however this does not represent trading by human means and services. As per the abovementioned judgment, the UK bankruptcy therefore cannot not qualify as a foreign non-main proceeding either and the application for recognition will be unsuccessful.

*** End of Assessment ***