



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 “studentnumber” 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 32.5/50

QUESTION 1 (multiple-choice questions) [10 marks in total] 7/10

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: **0** – The default position in NZ is that the receiver is an agent of the debtor company and not the appointment creditor (though the security document can alter this). Parties do not generally alter this position in contract, to keep matters in line with the Receiverships Act 1993

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:

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

(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: **0 – Liquidators have no duty to protect the interests for secured creditors; their primary obligation and duty is to unsecured creditors of the company.**

Liquidators in New Zealand:

(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: **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] **5/10**

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.

1. Insolvent transaction – Insolvent
2. Insolvent Charges – Insolvent
3. Transactions at Undervalue – Become Insolvent
4. Transactions with related parties – Become Insolvent
5. Charges granted to related parties – Become insolvent
6. Voidable dispositions – Become insolvent

- Refer to s 4 Companies Act 1993 which sets out solvency text – Company needs to be both balance sheet solvent as well as be able to pay its debts as they fall due in the ordinary course of business, to meet both limbs of the test. In the context of voidables, both limbs will be relevant in assessing solvency. Under s 292, the focus is generally on liquidity, though balance sheet will factor in as a matter of evidence. The transaction must have occurred at a time when the company was unable to pay its due debts.

Under s 293 of the Act, the focus is on whether the company was solvent immediately following the granting of the charge.

Also note the (rebuttable) presumption of insolvency, if the transaction occurred, or if the charge was granted, within the 6 month period prior to liquidation. For related parties, this period

Question 2.2 [maximum 3 marks] **2/3**

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?

1. Appointed by the High Court through a court order. **In this case, the Receivers powers are derived from the terms of the Court order and the Receiverships Act.**
2. Private appointment by virtue of section 6(1) of the Receiverships Act by a secured creditor exercising its contractual right under a security agreement. The receiver is required to act in the best interests of the person in whose interests he or she has been appointed in respect of the security. He or she must have reasonable regard to the interests of the grantor, parties claiming interests in the property through the grantor, unsecured creditors and sureties of the grantors obligations but only to the extent that is required to act in the interests of the appointing party/. The receiver's powers derive from contractual terms under which he or she was appointed and the provisions of the Receiverships Act.

Question 2.3 [maximum 2 marks] 1/2

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?

A creditor who has obtained judgement outside of New Zealand may apply to have the judgment recognized in New Zealand by way of the following:

- Reciprocal Enforcement of Judgments Act 1934 – by way of a court application
- Enforcement of Commonwealth Judgments under the senior Courts Act 20016 – by way of a court application
- Trans-Tasman Proceedings Act 2010 – through registration
- Common Law – by way of a court application

The Court generally plays a facilitative role. Once the judgment has been recognised or registered, the general enforcement processes in New Zealand are available, or as otherwise provided by the relevant legislation.

With respect to the common law process, a party would ordinarily be required to issue a proceeding to enforce the judgment. This is done through a summary process.

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.

Reasons why it hasn't gained traction:

1. Lack of preferential status for Inland Revenue Department claims as set out in Schedule 7 of the Companies Act.
2. The New Zealand's economy is largely made up of small to medium enterprises which may not be likely to sustain the costs of voluntary administrations. Costs can amount to between \$ 50 000 to \$60 000. Reasons for the large costs could be:

- a. The high rates charged by the administrators due to their personal liability which is uncured in undertaking administrations
 - b. Small number of qualified and experienced administrators
 - c. Processes involved and statutory meetings requirements can be costly
This ultimately means voluntary administrations would only be viable options for large companies, of which don't make up the majority of New Zealand's economy. These large costs wouldn't be viable options for small businesses which are already facing financial difficulties.
3. There is also statistically not a very high success rate of voluntary administrations when considering how many companies actually return to trading and remain registered compared with how many companies go into liquidation.
 4. There is a real possibility that if left too late the company may not be able to be saved via voluntary administration, which is often the case.
 5. The under use of the voluntary administration procedure may reflect the lack of confidence that secured creditors have in the scheme and the secured creditors seem to prefer to use other methods to enforce their rights and do not provide the backing required.

Based on the statistics it is clear that most voluntary administration's eventually end in liquidation. The possible reasons for this were listed in the paragraph above. There are advantages to using the voluntary administration procedure. I would advise a company to use the voluntary administration process when it's a medium to large corporation. This advice would come due to the high costs involved with undertaking a voluntary administration. I would also check to see the state of the company's affairs. Taking into account the amount of debt and the possibility of actually turning the company around and being able to provide an acceptable Deed of Company Arrangement to creditors. A voluntary administration provides a pause procedure so that the company can be saved. There is no court application required and it's relatively easy to undergo. This has advantages because it places a moratorium on process and stays creditor's actions. It appoints an administrator who is independent and who acts impartially which can provide a fresh opinion on the prospects of success. Creditors can agree to a compromise for the extension of payment of their debts or the reduction of their debts which can be facilitated by the administrator. The directors remain in control albeit with the supervision on the administrator. The administrator can try resolve creditors issues through a deed of company arrangement and restructure the company and debt obligations.

Other factors to consider

- Are there secured creditors? Would they be supportive? If not, VA unlikely to work.
- Would the majority of the general body be supportive?
- If possible, is it possible to gauge what the percentage of supportive creditors is, prior to appointment (by number and value of debt).
- Have any enforcement steps been taken? Over what assets? Are those assets critical to the business (e.g. a lease)? If so, VA might be difficult, as those steps are unlikely halted by the moratorium under the Act (though Court could intervene).
- Do the directors have PGs?

QUESTION 4 (fact-based application-type question) [15 marks in total] 8.5/15

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?

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

There are two ways in which Ms Finder could recover property located in New Zealand. The first option would be for Ms Finder to approach the High Court and obtain a recognition order under common law through the principals of private and international law. The purpose of the recognition order would be to provide assistance to the foreign representative without the requirement of initiating domestic insolvency proceedings in New Zealand. The New Zealand court would take into account the following considerations when deciding whether or not to grant the order of recognition. They would consider whether or not the foreign representative was appointed finally or not, whether the order would be contrary to public policy. The other option is for an application to the High Court in terms of the Insolvency (Cross border) Act of 2006. the foreign representative may apply in terms of Article 15 of Schedule 1 of the Rules applying to cross-border insolvency proceedings. In deciding whether or not to grant an order of recognition in terms of the Insolvency (Cross border) Act of 2006 the court will consider whether or not the action goes against public policy (Article 6). Article 17 sets out what a court must take into account when deciding whether or not to recognize a foreign proceeding. Article 17(1)(a) requires the foreign proceeding to fall within the meaning of 'foreign proceeding' listed in subparagraph (a) of Article 2. Article 17(1)(b) requires the foreign representative to fall within the definition of 'foreign representative' listed in subparagraph (d) of Article 2. Article 17(1)(c) requires the action to meet the requirements listed in paragraph 2 of Article 15, namely the documentation commencing the foreign proceeding and/ or the appointment of the foreign representative must accompany the action. Article 17(1)(d) requires the action to be brought in the High Court.

Relevant questions

1. Is there a foreign proceeding in terms of the Act? Is the bankruptcy a collective proceeding – Yes. Bankruptcy generally collective proceeding subjective to oversight of UK courts.
2. Is there a foreign representative? - Yes
3. Is the foreign proceeding a foreign main proceeding, or non-main proceeding – Article 17

In terms of recognition, the Court will be considering against the factual matrix, where the debtor's centre of main interests are (foreign main proceeding) or if foreign non main proceeding, whether there is establishment in the foreign state. On latter, Court will assess if there is place of operations in UK, if there is non-transitory economic activity with human means or goods of services.

The general presumption is that this is the place of habitual residence of the debtor (article 16), though this can be rebutted, for instance, where a party can still show employment in a foreign jurisdiction.

In this case, Mr Strong no longer has any employment in the UK, has no significant assets in the UK (including real property). Mr Strong does have property in New Zealand.

Unlikely to be either FMP or NMP on the facts.

The High Court could assist however in aid of the UK court, on application for aid under section 8 of the Act. Essentially allows the High Court to act in aid of foreign Court.

Question 4.2 [maximum 7 marks] 4.5/7

Question 4.2.1 [maximum 4 marks] 3/4

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) Ms Finder would have to apply in the High Court for the recognition of the foreign proceeding in terms of Article 15. From the time of filing the application for recognition, Ms Finder may request that interim relief be granted in terms of Article 19(1)(c). The relief that can be granted in terms of this section is set out in Article 21(1)(d) which provides for the examination of witnesses, taking of evidence or delivery of information concerning the debtors assets, affairs, right, obligations and liabilities. Article 21 allows the court to grant appropriate relief on recognition of foreign main and foreign non-main proceedings which would include the relief mentioned in Article 21(1)(d) which allows for the examination of witnesses and recovery of information relating the debtors affairs.
- (b) Ms Finder would have to apply in the High Court for the recognition of the foreign proceeding in terms of Article 15. From the time of filing the application for recognition, Ms Finder may request that interim relief be granted in terms of Article 19(1)(b). This relief would entrust all the assets located in New Zealand to the foreign representative or a court appointed person with the aim of protecting them and preventing them from being alienated. Articles 21(1)(a), (b), (c) and (e) allows the court to grant appropriate relief on recognition of foreign main and foreign non-main proceeding which would include the relief aimed at securing assets and prevention of the assets alienation by the debtor.

The above assumes that Ms Finder will have the proceeding recognised as a foreign main proceeding.

If not, one possible option is to seek the assistance of the High Court to exercise its powers under the Court rules in aid of information seeking, Interim orders on application for recognition, even where not yet determined. Seek order to secure assets

Question 4.2.2 [maximum 3 marks] 1.5

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

Yes I do believe that the application would be successful. The facts of Ms Finder's case are similar to the facts in the case of *Williams v Simpson* [2011] 3 NZLR 380. In the *Simpson* case the court had to consider a foreign representative's recognition application. The court held that when considering the debtors centre of main interest there is a presumption that the centre of main interest referred to the debtors place of habitual residence. The court held that in order for it to grant recognition as a foreign main proceeding the foreign representative must show that the debtor had he center of main interest in England. There was a presumption that the debtors individual residence was in New Zealand. The court did however grant relief under Article 8 of Schedule 1 which allowed the foreign representative to realize assets located in New Zealand. Article 17(2)(a) and (b) determine where or not the foreign proceeding will be seen as a foreign main or foreign non-main proceeding. Article 20 automatically grants certain relief if the foreign main proceeding is recognized. In a foreign non-main proceeding certain relief can be granted on discretion of the court in terms of article 21.

The Court in *Williams v Simpson* declined to recognise the proceeding as foreign main proceeding or non-main proceeding.

On balance, the Court would likely determine, as it did in *Williams* that it cannot recognise the proceeding either as a FMP or NMP because:

- Habitual place of residence in NZ (COMI in NZ)
- None economic activity occurring in UK
- No significant assets in UK
- Assets appear to be in NZ

Court could however exercise discretion under s 8 of Insolvency (Cross-Border) Act 2006 to provide assistance to assist with enforcement

*** End of Assessment ***