



Original mark: 37.5/50

Updated mark: 27.5/50 = 55% (see comment inserted by Course Leader below)

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5C

CAYMAN ISLANDS

This is the summative (formal) assessment for Module 5C of this course and must be submitted by 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 5C. 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.assessment5C]. An example would be something along the following lines: 202223-336.assessment5C. 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 9 pages.**

ANSWER ALL THE QUESTIONS

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.

Once an application for a restructuring officer is filed:

- (a) **No action may be commenced against the company without leave of the court.**
- (b) **No existing action may be continued against the company without permission of the provisional liquidator.**
- (c) **Legal proceedings may be commenced or continued against the company without leave of the court.**
- (d) **No action may be commenced against the company.**

Commented [BT1]: Correct answer was A

Question 1.2

Which of the following is not available to a debtor company in the Cayman Islands?

- (a) **Appointment of a receiver.**
- (b) **Court-supervised liquidation.**
- (c) **Official liquidation.**
- (d) **Deed of Company Arrangement.**

Commented [BT2]: Correct answer was D

Question 1.3

Select the correct answer.

In a voluntary liquidation:

(a) *The company may cease trading where it is necessary and beneficial to the liquidation.*

(b) *The company must cease trading except where it is necessary and beneficial to the liquidation.*

(c) *The company must cease trading if it is necessary and beneficial to the liquidation.*

(d) *The company may cease trading unless it is necessary and beneficial to the liquidation.*

Question 1.4

Select the correct answer.

The Grand Court of the Cayman Islands has jurisdiction to make winding up orders in respect of:

(a) *A company incorporated in the Cayman Islands.*

(b) *A company with property located in the Cayman Islands.*

(c) *A company carrying on business in the Cayman Islands.*

(d) *Any of the above.*

Question 1.5

Select the correct answer.

In a provisional liquidation, the existing management:

(a) *Continues to be in control of the company.*

(b) *Continues to be in control of the company subject to supervision by the court and the provisional liquidator.*

(c) *May continue to be in control of the company subject to supervision by the provisional liquidator and the court.*

(d) *Is not permitted to remain in control of the company.*

Question 1.6

Select the correct answer.

When a winding up order has been made, a secured creditor:

- (a) May enforce their security with leave of the court.*
- (b) May enforce their security with leave of the court provided the liquidator is on notice of the application.*
- (c) May enforce their security without leave of the court.***
- (d) May not enforce their security until the liquidator has adjudicated on the proofs of debt.*

Question 1.7

Select the correct answer.

Any payment or disposal of property to a creditor constitutes a voidable preference if:

- (a) It occurs in the six months before the deemed commencement of the company's liquidation, or at a time when it is unable to pay its debts and the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.*
- (b) It occurs in the six months before the deemed commencement of the company's liquidation and at a time when it is unable to pay its debts and the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.***
- (c) It occurs in the six months before the deemed commencement of the company's liquidation and at a time when it is unable to pay its debts, or the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.*
- (d) It occurs in the six months before the deemed commencement of the company's liquidation, or at a time when it is unable to pay its debts, or the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.*

Question 1.8

Which of the following is not a preferential debt ranking equally with the other four?

- (a) Sums due to company employees.
- (b) Taxes due to the Cayman Islands government.
- (c) Amounts due to preferred shareholders.
- (d) Sums due to depositors (if the company is a bank).
- (e) Unsecured debts which are not subject to subordination agreements.

Commented [BT3]: Correct answer was C

Question 1.9

Select the incorrect statement.

A company may be wound up by the Grand Court if:

- (a) The company passes a special resolution requiring it to be wound up.
- (b) The company does not commence business within a year of incorporation.
- (c) The company is unable to pay its debts.
- (d) The board of directors decides it is "just and equitable" for the company to be wound up.
- (e) The company is carrying on regulated business in the Cayman Islands without a license.

Question 1.10

Select the correct answer.

In order for a proposed creditor scheme of arrangement to be approved:

- (a) 50% or more representing 75% or more in value of the creditors must agree.
- (b) 50% or more representing more than 75% of the creditors must agree.
- (c) More than 50% representing more than 75% of the creditors must agree.
- (d) More than 50% representing 75% or more in value of the creditors must agree.

Commented [BT4]: 7 out of 10 for Q1

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Is it possible for a creditor to register its security over an asset in the Cayman Islands? If so, how, and what is the effect of it doing so, if any?

[Although there is no public security registration regime in the Cayman Islands, it does have ownership registers with regards to real estate, ships, aircraft, motor vehicles and intellectual property. These ownership registers are in the form of mortgages or charges which can be registered over the immovable or movable property. Section 54(1) and (2) of the Cayman Islands Companies Law (hereinafter referred to as the Companies Law) stipulates that:

“Every limited company shall keep at its registered office in writing on one or more sheets, whether bound or unbound, a register of all mortgages and charges specifically affecting property of the company, and shall enter in such register in respect of each mortgage or charge a short description of the property mortgaged or charged, the amount of charge created and the names of the mortgagees or persons entitled to such charge.

(2) If any property of the company is mortgaged or charged without such entry as aforesaid being made, every director, manager or other officer of the company who knowingly and willfully authorizes or permits the omission of such entry, shall incur a penalty of one hundred dollars.”

Therefore, any future purchaser of the assets will be deemed to have knowledge of any mortgage or other interest registered prior to the purchase thereof as well as any creditor must ensure that it has sufficient control over its asset and review a company's register of mortgages and charges before it may approve granting credit to a prospective purchaser.]

Commented [BT5]: 2.5 marks

Question 2.2 [maximum 4 marks]

Does the Cayman Islands Grand Court have the power to assist foreign bankruptcy proceedings? If so, what is the source of that power and in what circumstances may it exercise it?

[The legal basis within which the Cayman Islands Grand Courts power exists, comes from the Company's Law part XVII. In terms of section 241, the court may make orders ancillary to a foreign bankruptcy proceeding for the following purposes:

241(1)(a) recognising the right of a foreign representative to act in the Islands on behalf of or in the name of a debtor;

(b) enjoining the commencement or staying the continuation of legal proceedings against a debtor;

(c) staying the enforcement of any judgment against a debtor;

(d) requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and produce documents to its foreign representative; and

(e) ordering the turnover to a foreign representative of any property belonging to a debtor.

The Court in its determination as to whether it shall grant an ancillary order under section 241 must assess the criteria which will best assure an economic and expeditious administration of the debtors estate in the following circumstances in which such powers may be exercised:

242(1) (a) the just treatment of all holders of claims against or interests in a debtor's estate wherever they may be domiciled;

(b) the protection of claim holders in the Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding;

(c) the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate;

(d) the distribution of the debtor's estate amongst creditors substantially in accordance with the order prescribed by Part V;

(e) the recognition and enforcement of security interests created by the debtor;

(f) the non-enforcement of foreign taxes, fines and penalties; and

(g) comity.

In order to retain its transparency and ensure creditors or interested parties are notified, when a company is made the subject of a foreign bankruptcy proceeding, a publication of such proceeding must be filed with the Registrar and published in The Gazette (section 243(1) of the Companies Law. The notice contains prescribed particulars followed by the company's liquidator or directors (section 243(2) and any liquidator or director who fails to publish the notice within 14 days will be liable for an offence (section 243(3).]

Commented [BT6]: 4 marks

Question 2.3 [maximum 3 marks]

Outline the legal framework for the recognition of foreign judgements in the Cayman Islands.

[the legal framework for the recognition of foreign judgements in the Cayman Islands is based on statute and common law. The Foreign Judgments Reciprocal Enforcement Law (1996 Revision) forms the basis of the legal framework for recognition of foreign judgements in the Cayman Islands. Section 3 of the Foreign Judgements Act states:

3. (1) The Governor, if he is satisfied that in the event of the benefits conferred by this Part being extended to judgments given in the superior courts of a foreign country, substantial reciprocity of treatment will be assured as respects the enforcement in such country of judgments given in the Grand Court, may, by order, direct that to foreign countries

(a) this Part shall extend to that foreign country; and

(b) such courts of that foreign country as are specified in the order shall be deemed superior courts of that country for the purposes of this Part.

Commented [BT7]: Yes, this is limited to Australia only at present but the common law provides a solution

Furthermore, a foreign judgement can be recognised at common law level if it meets the following requirements:

- (a) the judgment is final;
- (b) the foreign court had jurisdiction over the debtor;
- (c) the foreign judgment was not obtained by fraud;
- (d) the foreign judgment is not contrary to public policy of the Cayman Islands; and
- (e) the foreign judgment was not obtained contrary to the rules of natural justice.

There is however a six-year limitation period which applies to the enforcement of a foreign judgement under both the common law and the 1996 revision. The six year period commences on the date of judgement or the date of the last appeal judgement/

Commented [BT8]: 2.5 marks

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

Question 3.1 [maximum 9 marks]

In the absence of a statutory prohibition on insolvent trading, is it possible for court appointed liquidators of an insolvent company, or creditors of such a company, to hold its former directors accountable by either seeking financial damages against those directors and / or by seeking to “claw back” any payments that those directors should not have made? If so, please explain the possible options.

[I respectfully disagree with the above mentioned statement as directors have a duty to cooperate and liquidators have the power of private examination of relevant persons in terms of section 103 of the Companies Law. In terms of section 103(5) the court may order that the director swear an affidavit in answer to written interrogatories or attend an oral examination by the official liquidator or in some instances both.

In terms of section 103(7)(a) the Court may make an order against the director. Furthermore the court has the power in terms of section 145 of the companies law to reverse or void any payment or disposal of property if it is found that the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors. The test for voidable preference was explained in the case of *Weaving Macro Fixed Income Fund Ltd (in Liquidation)* [2016 (2) CILR 514].

Should a director be found to have conducted fraudulent trading in terms of section 147 of the Companies Law, then the director may be held personally liable for any losses which the company may have suffered as a result of their breach of their fiduciary duty to act in a company's best interests which includes acting in the best interests of creditors as was the case in *Prospect Properties v McNeill* [1990-91 CILR 171]. Directors can be prosecuted and the official liquidator may pursue a claim against the director for breach of their fiduciary duty.

Therefore although in some instances the Grand Court may vest powers with directors which is known as the “light touch” approach, there are most certainly ramifications should it be found that a director has breached it's fiduciary duty/

Commented [BT9]: Good. Sections 146 and 99 of the Companies Act also relevant. 7.5 marks.

Question 3.2 [maximum 6 marks]

Receivers have no role to play in a Cayman Islands insolvency scenario. Discuss.

[Although the appointment of receivers are not specifically mentioned in the Companies Law, they most certainly have a role to play in the winding up of a company and can be appointed by the Court. Order 30 of the Grand Court Rules is concerned with the appointment of a receiver and states:

(1) An application for the appointment of a receiver may be made by summons or motion.

(2) An application for an injunction ancillary or incidental to an order appointing a receiver may be joined with the application for such order.

(3) Where the applicant wishes to apply for the immediate grant of such an injunction, he may do so *ex parte* on affidavit.

(4) The Court hearing an application under paragraph (3) may grant an injunction restraining the party beneficially entitled to any interest in the property of which a receiver is sought from assigning, charging or otherwise dealing with that property until after the hearing of a summons for the appointment of the receiver and may require such a summons, returnable on such date as the Court may direct, to be issued.

Receivers are usually appointed by the court for the purposes of collecting money or to carry out other duties which assist the court (Order 45). In segregated portfolio companies receivers specifically provided for two for fool the purpose of either closing down of a business attributed to the segregated portfolio or the distribution of segregated portfolio assets. It is also important to note that an application for a receiver halts any other suit, action or other proceeding against a segregated portfolio company.

A receiver may also be appointed by a creditor. this is usually done by a creditor in order to secure its instrument. Should a charging document space specifically provide for the appointment of a receiver then the receiver may be appointed without any court order and will derive its powers as set out in the charge document. The receiver will primarily realize the value of the charged asset and also/ or recover the debt owed to the creditor.

Therefore, it is clear that although or receivers are not specifically defined in the main Companies Law of the Cayman Islands, they play an important role in assisting other interested parties such as the Court and/or creditors, in the liquidation of a company.]

Commented [BT10]: Good but don't forget receivers in the context of SPCs. 4 marks.

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

Vegan Patty Inc (VP) is a company registered in the Cayman Islands. It operates a fleet of party boats cross central America and the Caribbean. It was founded by the wealthy Rackham family over 40 years ago. The family continues to own and manage the business.

Between 2015 and 2019, VP had been rapidly expanding its operations. However, the unexpected slump in worldwide tourism at the start of 2020 due to COVID-19 adversely affected its revenues.

Commented [INS 111]: No marks awarded for this question. Answer is applicable to the 2021/22 assessment and not 2022/23.

Course Leader.

VP has only managed to stay afloat for the past three years with the assistance of a very large loan from Blue Iguana Treasure Bank (BITB). BITB has lent VP USD 300 million (USD 180 million of which is secured by a mortgage over four of VP's largest party boats). The loan facility has now been exhausted. VP has also fallen behind on the monthly repayments to BITB.

This year, the tourism market picked up again; however, VP cannot afford to pay the ongoing costs associated with maintaining its fleet of ships (which include electricity and water costs for its huge dry dock facility, ongoing engineering and mechanical costs and also wages, pension and health insurance for its reduced team of employees) let alone find enough money to buy the vast quantities of rum it needs to keep the tourist customers suitably refreshed.

To make matters worse, VP commissioned Johnson & Boris Ltd (JoBo) to build seven more oversized party boats only a few months before the pandemic struck. VP attempted to wriggle out of the contract but, by virtue of an arbitration clause, the dispute was referred to the ICC sitting in London. Earlier this month, the ICC ruled that VP must pay damages of USD 50 million to JoBo within 45 days. VP has no prospect of being able to satisfy that award.

You are a Cayman Islands-based insolvency professional and have been approached to provide advice on the following:

- (a) What action can BITB take to protect its interests?***
- (b) What action can JoBo take to protect its interests?***
- (c) What action can the unpaid employees take against VP?***
- (d) Does the Cayman Islands Court have jurisdiction over VP?***
- (e) Is there a legal route via which VP can protect itself and seek to restructure?***
- (f) Following on from (e) above, can the Rackham family continue play a part in running VP during any restructuring process?***
- (g) What factors will the Cayman Islands court take into consideration before approving any proposed restructuring?***

(a) Monster may take action against the Black Pearl by securing its USD 40 million by way of filing a notice of the security with the centrally maintained registers. they do not need a court application for the secured amount. The rest of the unsecured amount may be proven in the liquidation by furnishing the proof of death which states the particulars of the security and the value of the security.

Commented [BT12]: 2 marks

(b) Jolly Roger must file a bankruptcy petition with the Grand Court as Black Pearl is unable to satisfy the award. the petition must contain the details of Black Pearls financial affairs as well as the fact that Jolly Roger has obtained final judgment against Black Pearl for not less than KYD 40 and has served on them in the Islands, a bankruptcy notice in writing and the Black Pearl has not, within seven days after the service of notice, paid such amount.

Commented [BT13]: The examiner was looking for reference to the recognition and enforcement of arbitration awards (FAAEA 1997 and AA 1996). Once recognised it is correct that a petition to wind up can be filed. 1 mark.

(c) the unsecured creditors may file a winding up petition against Black Pearl.

Commented [BT14]: 1/2 mark. They would be preferential creditors pursuant to section 141 of the Companies Act.

(d) Yes, the Court does have jurisdiction over Black Pearl due to the fact that the company was registered in the Cayman Islands.

Commented [BT15]: Correct. Per section 91 Companies Act. 1 mark.

(e) Yes, Black Pearl may apply to the court with an application for restructuring such as a scheme of arrangement with an order for provisional liquidation. This would allow the company to either restructure or be placed into provisional liquidation. However, the most important aspect of this proceeding is the fact that it would then place a moratorium on creditors' claims and give the company time to assess whether it can be restructured or not.

Commented [BT16]: Yes, the candidate has identified the key point but don't forget the company restructuring officer per section 91 A-J. 2 marks

(f) Yes, the Sparrow family can continue to run Black Pearl during this process due to the light touch provisional liquidations. This allows existing management to continue to be in control of the company subject to the supervision of the provisional liquidator as well as the Grand Court.

Commented [BT17]: Yes, it depends on the terms of the order made by the court. 1

(g) The court must be satisfied that issues of class composition, any jurisdictional issues, and the adequacy of the scheme documentation notice is all in order before it may choose to grant or approve the scheme of arrangement in terms of Order 102, Rule 20 of the Grand Court Rules. An application must be made to the Grand Court for an Order that the meetings of creditors or members be convened for the approval of the scheme. Furthermore, the scheme proposals must be either approved or rejected at the meetings and if approved an application is then made to the grand court to obtain approval/sanction.

Commented [BT18]: 2.5

Commented [BT19]: 10/15 for Q4

* End of Assessment *

Commented [BT20]: Total marks 37.5 out of 50