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**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5B**

**BRITISH VIRGIN ISLANDS (BVI)**

This is the **summative (formal) assessment** for **Module 5B** 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 5B**. 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 or Avenir Next 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.assessment5B]**. An example would be something along the following lines: 202223-336.assessment5B. **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 2024**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2024**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

**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**

For the purposes of a **qualifying resolution** for an insolvent liquidation to **appoint a liquidator** under section 159 the Insolvency Act 2003 by the company’s members, what is the required majority of those who are present and entitled to vote?

1. 50%.
2. 75%.
3. 100%.
4. 90%.

**Question 1.2**

In order to comply with section 156 of the Insolvency Act 2003, **what timeframe** for payment of the debt (or to secure or compound for the debt), must a statutory demand require?

1. Within 14 days of the service of the statutory demand.
2. Within 21 days of the date of the statutory demand.
3. Within 21 days of the service of the statutory demand.

1. Within 14 days of the date of the statutory demand.

**Question 1.3**

Which of the following **is not able** to make an application for the removal of a liquidator?

1. A member of the company.
2. A creditor.
3. The creditors’ committee.
4. A receiver.

**Question 1.4**

Where a receiver exercises a power of sale, the receiver owes a duty to obtain the best price reasonably obtainable at the time of sale. **To which one of the following is the duty owed to**?

1. The creditors, the shareholders, persons claiming an interest in the assets and the company.
2. The creditors, sureties, the shareholders and the company.
3. The creditors, sureties, persons claiming an interest in the assets of the company and the company.
4. The creditors, shareholders, sureties and persons claiming an interest in the assets of the company.

**Question 1.5**

Who cannot apply for a provisional liquidator to be appointed in a company?

1. The Attorney General.
2. The company.
3. A creditor.
4. A secured creditor.

**Question 1.6**

Under the Reciprocal Enforcement of Judgments Act 1922, what is the **time period** during which a foreign judgment is registrable in the BVI?

1. Within 12 months of the date of judgment.
2. Within three (3) months of the date of trial.
3. Within six (6) months of the date of judgment.
4. Within six (6) months of the date of trial.

**Question 1.7**

Which one of the below **is not** an effect of the appointment of a liquidator over a company?

1. The assets automatically vest in the liquidator.
2. No amendment allowed to the memorandum or articles of association of the company.
3. Shares in the company can be transferred.
4. No action can commence or proceed against the company unless ordered by the Court.

**Question 1.8**

In a liquidation, what is the **vulnerability period** for an undervalue transaction in the case of a transaction entered into with a connected person?

1. Two (2) years prior to the onset of insolvency and ending on the appointment of the liquidator.
2. Two (2) years prior to the appointment of the liquidator.
3. Six (6) months prior to the onset of insolvency and ending on the appointment of the liquidator.
4. Five (5) years prior to the appointment of the liquidator.

**Question 1.9**

Which of the following **is not** a resolution that the directors of a company must pass in order to put in place a company creditors’ arrangement?

1. Stating that the company is insolvent or is likely to become insolvent.
2. Approving a written proposal setting out how the creditors’ rights will be varied or cancelled.
3. Approving a liquidation plan and a declaration of solvency.
4. Nominating an eligible insolvency practitioner to be appointed interim supervisor.

**Question 1.10**

What is required to place a company into voluntary liquidation?

1. Directors’ resolution to appoint a voluntary liquidator.
2. A liquidation plan approved by the directors and a resolution passed by shareholders approving the liquidation plan.
3. Declaration of Solvency.
4. All of the above.

**QUESTION 2 (direct questions) [10 marks]**

**Question 2.1 [maximum 2 marks]**

When is an eligible licensed insolvency practitioner required to be appointed under the Insolvency Act 2003, and what is meant by “eligible”?

An eligible licensed insolvency practitioner may be appointed over an insolvent British Virgin Islands company, foreign company or an individual’s estate as a trustee in bankruptcy[[1]](#footnote-1) under the Insolvency Act 2003 (“**Insolvency Act**”).

Section 2 of the Insolvency Act defines “eligible insolvency practitioner” as “*an insolvency practitioner who is eligible to act in relation to a company, foreign company or individual in accordance with section 482*”[[2]](#footnote-2). Under section 482(1), a “*person is eligible to act as an insolvency practitioner in relation to a company, a foreign company or an individual*” if the following conditions are met: they are a licenced insolvency practitioner[[3]](#footnote-3), they have given their written consent to act in the prescribed form[[4]](#footnote-4), they are not disqualified from holding a licence[[5]](#footnote-5), they are not disqualified from acting for the company or foreign company[[6]](#footnote-6) or individual[[7]](#footnote-7) and there is in force such security for the proper performance of their functions[[8]](#footnote-8).

**Question 2.2 [maximum 2 marks]**

In what circumstances can a statutory demand be issued under the Insolvency Act 2003, and by whom?

Part V (section 149 to section 157) of the Insolvency Act 2003 (“**Insolvency Act**”) contains provisions which are equally applicable to an insolvent company and a bankrupt, including statutory demands.[[9]](#footnote-9) A statutory demand is a written demand to a debtor for payment of a debt which is due and payable.[[10]](#footnote-10) Section 155(2)(a) of the Insolvency Act states that a statutory demand shall be issued “*in respect of a debt that is due and payable at the time of the demand and that is not less than the prescribed minimum* [emphasis added]”.[[11]](#footnote-11) Rule 149(1) of the Insolvency Rules 2005 states that $2,000.00 is the minimum sum for which a statutory demand may be issued.[[12]](#footnote-12)

The statutory demand shall also, *inter alia*, be in writing and specify the nature of the debt[[13]](#footnote-13) and set out the debtor’s right to apply to set the statutory demand aside under section 156.[[14]](#footnote-14)

Section 155(1) states that a creditor may issue a statutory demand “*on a person for payment of a debt owed by that person to him*.”[[15]](#footnote-15)

**Question 2.3 [maximum 2 marks]**

Under the BVI Business Companies Act 2004, when is a company required to have a registered agent and when is one not required?

Under section 91(1) of the BVI Business Companies Act 2004 (“**BCA**”), a company shall, at all times, have a registered agent in the BVI[[16]](#footnote-16), unless it is in insolvent liquidation (then it does not require a registered agent)[[17]](#footnote-17).

Section 91A(1) of the BCA states that if at any time the company does not have a registered agent, it shall immediately, by resolution of either the members or directors, appoint a registered agent.[[18]](#footnote-18) If the company does not have a registered agent (contrary to section 91(1)), the company commits an offence and is liable on summary conviction to a fine of $10,000.[[19]](#footnote-19) Further, it should be noted that the Registrar of Corporate Affairs has the power to strike the name of a company off the Register of Companies if a company does not have a registered agent[[20]](#footnote-20).

Section 91(3) states that no person is to be, or shall agree to be, a company’s registered agent unless they hold a licence under either the Company Management Act[[21]](#footnote-21) or the Banks and Trust Companies Act that authorises it to provide registered agent services[[22]](#footnote-22).

**Question 2.4 [maximum 4 marks]**

When can the Court appoint a liquidator under the Insolvency Act 2003? And who can make an application for such an appointment?

Under section 159(1) of the Insolvency Act 2003 (“**Insolvency Act**”), the court may appoint the Official Receiver or an eligible insolvency practitioner as liquidator of a:

1. BVI company (on an application under section 162)[[23]](#footnote-23); or
2. foreign company (on an application under section 163)[[24]](#footnote-24).

**Appointment of liquidator by court – section 162**

Under section 162(1) of the Insolvency Act, the court may appoint a liquidator of a company under section 159(1) if one of the following conditions is met:

1. “*the company is insolvent*”[[25]](#footnote-25);
2. “*the Court is of the opinion that it is just and equitable that a liquidator should be appointed* [emphasis added]”[[26]](#footnote-26); **or**
3. “*the Court is of the opinion that it is in the public interest for a liquidator to be appointed*.”[[27]](#footnote-27)

Standing to bring application under section 162

In terms of who has standing to make an application for such an appointment under section 162(1), section 162(2) states that an application may be made by one or more of the following: the company[[28]](#footnote-28), a creditor[[29]](#footnote-29), a member[[30]](#footnote-30), the supervisor of a creditors’ arrangement in respect of the company[[31]](#footnote-31), the Financial Services Commission (the “**Commission**”)[[32]](#footnote-32) and the Attorney General[[33]](#footnote-33).

Section 168(1) states that an application for the appointment of a liquidator shall be determined within 6 months after the application is filed.[[34]](#footnote-34) The court may, as it considers fit, extend the period up to 3 months[[35]](#footnote-35) if there were special circumstances justifying such an extension[[36]](#footnote-36) and the order extending the period is made before the expiry of that period.[[37]](#footnote-37)

It should be noted that:

1. If the company is insolvent, an application by a member “*may only be made with the leave of the Court, which shall not be granted unless the Court is satisfied that there is a prima facie case that the company is insolvent.*”[[38]](#footnote-38);
2. Appointing a liquidator over a BVI company on “*just and equitable grounds*” has been given a wide meaning under case law including where there is no justification for the company continuing to exist;[[39]](#footnote-39) and
3. Only the Commission or the Attorney General may apply to appoint a liquidator if the court is of the opinion that it is in the public interest for a liquidator to be appointed[[40]](#footnote-40). In this situation, the Commission may only apply to appoint a liquidator if the company in question “*is, or at any time has been, a regulated person or the company is carrying on, or at any time has carried on, unlicensed financial services business*.”[[41]](#footnote-41)

**Appointment of liquidator of a foreign company – section 163**

Under section 163(1) of the Insolvency Act, the court may appoint a liquidator of a foreign company under section 159(1) if the court is satisfied that the company in question has a connection with the BVI and one of the following conditions is met:

1. “*the company is insolvent*”[[42]](#footnote-42);
2. “*the Court is of the opinion that it is just and equitable that a liquidator should be appointed*”[[43]](#footnote-43);
3. “*the Court is of the opinion that it is in the public interest for a liquidator to be appointed*”[[44]](#footnote-44);
4. “*the company is dissolved or has otherwise ceased to exist under or by virtue of the laws of the country in which it was last registered*”[[45]](#footnote-45);
5. “*the company has ceased to carry on business*”[[46]](#footnote-46); or
6. “*the company is carrying on business only for the purpose of winding up its affairs.*”[[47]](#footnote-47)

Section 163(2) states that a foreign company will only have a connection with the BVI if:

1. it has or appears to have assets in the jurisdiction;[[48]](#footnote-48)
2. it carries on, or has carried on business in the jurisdiction;[[49]](#footnote-49) or
3. there is a reasonable prospect that appointing a liquidator of the company will benefit the company’s creditors.[[50]](#footnote-50)

Standing to bring application under section 163

In terms of who has standing to make an application for such an appointment under section 163, section 163(1) states that an application may be made by those persons listed under section 162(2), namely: the company[[51]](#footnote-51), a creditor[[52]](#footnote-52), a member[[53]](#footnote-53), the supervisor of a creditors’ arrangement in respect of the company[[54]](#footnote-54), the Commission[[55]](#footnote-55) and the Attorney General[[56]](#footnote-56).

It should be noted that, similar to section 162(4), only the Commission or the Attorney General may apply to appoint a liquidator if the court is of the opinion that it is in the public interest for a liquidator to be appointed[[57]](#footnote-57). In this situation, the Commission may only apply to appoint a liquidator under section 163(1)(c) “*if the foreign company concerned is or at any time has been, a regulated person or the company is carrying on, or at any time has carried on, unlicensed financial services business*.”[[58]](#footnote-58)

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

**Question 3.1 [maximum 5 marks]**

With reference to the relevant legislation, what are the requirements to be appointed as a voluntary liquidator in the BVI after 1 January 2023?

Voluntary liquidation is for the predominant purpose of dealing with the company’s assets and liabilities (if any) in order to dissolve the (solvent) company.[[59]](#footnote-59) Amendments to legislation in recent years has increased the focus of the voluntary liquidator’s role in the British Virgin Islands (“**BVI**”)[[60]](#footnote-60). The requirements to be appointed as a voluntary liquidator in the BVI after 1 January 2023 is set out in the BVI Business Companies (Amendment) Act 2022 (“**BCA 2022**”) and the BVI Business Companies (Amendment) Regulations 2022 (“**Regulations 2022**”).

**Residency requirement**

A key legislative change is the residency requirement introduced for a voluntary liquidator. Section 2(1) of the BCA 2022 defines “voluntary liquidator” as “*a liquidator who is resident in the Virgin Islands and appointed under section 199* [emphasis added]”[[61]](#footnote-61). The residency requirement is set out in section 2(2). A liquidator will be considered resident in the BVI if, prior to their appointment as a voluntary liquidator, they were “*living physically in the Virgin Islands for a period of not less than 180 days, whether continuously or in aggregate*.”[[62]](#footnote-62)

In the event that joint liquidators are appointed over the BVI company after 1 January 2023, it is a requirement that at least one of the joint voluntary liquidators is resident in the jurisdiction (as per section 2(2))[[63]](#footnote-63). The residency requirement will not apply to the other joint liquidator if they are resident outside of the BVI[[64]](#footnote-64). It should be noted that the residency requirement set out above applies only for appointments made after 1 January 2023. Voluntary liquidators who were appointed before 1 January 2023 are not affected by the legislative changes[[65]](#footnote-65) and can continue to act in the existing liquidation until they are concluded without having to satisfy the new residency and experience / qualification (see below) requirements[[66]](#footnote-66).

**Experience / qualification requirements**

Regulation 19 of the Regulations 2022 sets out the qualification requirements for an individual to be appointed and to act as a voluntary liquidator of a BVI company. An individual is eligible to be appointed and to act as a company’s voluntary liquidator if they are qualified to act as a voluntary liquidator under regulation 19(1A)[[67]](#footnote-67) and are not disqualified from acting as a voluntary liquidator under regulation 19(2).[[68]](#footnote-68)

In terms of qualification, regulation 19(1A) states that an individual is qualified to appointed and act as a voluntary liquidator of a company if they:

1. have not less than 2 years liquidation experience[[69]](#footnote-69);
2. have the professional competence to liquidate the company concerned[[70]](#footnote-70);
3. hold an insolvency practitioner’s licence issued by the Financial Services Commission[[71]](#footnote-71) (“**Commission**”) or can demonstrate an appropriate professional qualification (for example in law) and “*experience of providing legal or financial advice or support to companies in the financial services sector*”[[72]](#footnote-72); and
4. are familiar with the relevant financial services legislation connected to the company’s business including the Financial Services Commission Act[[73]](#footnote-73).

A distinction can be made between a liquidator in an insolvent liquidation and in a voluntary liquidation. In the latter, the liquidator need not be a licenced insolvency practitioner (unless the company is a regulated one) but the person must be an “eligible individual”.[[74]](#footnote-74) Regulation 19(2) states that an individual is disqualified from being appointed or acting as a voluntary liquidator of a company if, *inter alia*, they are not resident in the BVI in accordance with section 2(2)[[75]](#footnote-75).

**Appointment of voluntary liquidator under section 199 of the BCA 2022**

In addition to the residency and experience / qualification requirements (detailed above) for appointing a voluntary liquidator, section 199 sets out the procedure for appointing a voluntary liquidator. Section 199(1) states that a voluntary liquidator (or two or more joint voluntary liquidators) may be appointed either by a resolution of the directors[[76]](#footnote-76) or a resolution of members[[77]](#footnote-77).

Appointment by resolution of directors

Section 199(2) states the circumstances in which an eligible individual may be appointed voluntary liquidator of the company (by way of a resolution of the directors) including if the company’s memorandum or articles permit the directors to pass a resolution for the appointment of a voluntary liquidator and the members have, by resolution, approved the liquidation plan.[[78]](#footnote-78)

Appointment by resolution of members

Section 199(3) states that a company’s members may, by resolution, approve the liquidation plan[[79]](#footnote-79) and appoint an eligible individual as the company’s voluntary liquidator[[80]](#footnote-80).

Appointment of voluntary liquidator of regulated person

Section 200 states that where the company is a regulated person, a resolution appointing a voluntary liquidator shall not be passed under section 199 (by either the directors or members) unless the Commission has “*given its prior written consent to the company being put into voluntary liquidation*”[[81]](#footnote-81) and “*approved the appointment of the individual proposed as voluntary liquidator*.”[[82]](#footnote-82) If section 200(3)(a) and section 200(3)(b) are not complied with, any resolution passed in contravention to these sections will be void and of no effect[[83]](#footnote-83).

It should be noted that certain specified categories or descriptions of regulated persons may mean that the voluntary liquidator or at least one of the voluntary liquidators (where joint voluntary liquidators are appointed), shall be a licensed insolvency practitioner[[84]](#footnote-84).

**Notice and advertisement of liquidation**

Section 204 states that a voluntary liquidator appointed under section 199 shall within 14 days of the date of their appointment file a notice of their appointment in the approved form[[85]](#footnote-85), the declaration of solvency made by the directors[[86]](#footnote-86) and a copy of the liquidation plan[[87]](#footnote-87). The voluntary liquidator appointed shall also, within 30 days of commencement of the liquidation, advertise notice of their appointment.[[88]](#footnote-88)

It is a requirement that the declaration of solvency, together with the statement setting out the company’s assets and liabilities, are kept at the office of the company’s registered agent[[89]](#footnote-89). The company will commit an offence and be liable on summary conviction to a fine of $5,000 if it contravenes this requirement.[[90]](#footnote-90)

**Conclusion**

Even though voluntary liquidations are generally more straightforward that an insolvent liquidation, as set out above, certain legislative changes have taken place in the last 2 years and there are certain additional requirements to comply with to ensure that a voluntary liquidator is properly appointed.

**Question 3.2 [maximum 5 marks]**

What can be included in an order granted by the Court following a request by a foreign representative to aid in a foreign proceeding under section 467 of the Insolvency Act 2003?

There are two parts of the Insolvency Act 2003 (“**Insolvency Act**”) that deal with cross-border insolvency[[91]](#footnote-91), namely Part XVIII (Cross-Border Insolvency General Provisions) and Part XIX (Orders in Aid of Foreign Proceedings). Part XVIII sets out the provisions which are based on the UNCITRAL Model Law on Cross-Border Insolvency - however, to date, it is still not in force.

**Part XIX (Orders in Aid of Foreign Proceedings)**

Part XIX (section 466 to section 472), which is in force, sets out the powers provided to the BVI courts to make orders in aid of “foreign proceedings” - i.e. the BVI courts can recognise certain foreign insolvency proceedings and can assist the “foreign representative”.[[92]](#footnote-92) The BVI courts have the power to make orders assisting foreign representatives in certain specified jurisdictions including Hong Kong and the United Kingdom.

Under section 466(1), “foreign proceeding” is defined as “*a collective judicial or administrative proceeding in a relevant foreign country…pursuant to a law relating to insolvency in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation, liquidation or bankruptcy*”[[93]](#footnote-93). A “foreign representative” is “*a person or body…authorized in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's property or affairs or to act as a representative of the foreign proceeding*”[[94]](#footnote-94).

Section 467 - Order in aid of foreign proceeding

Section 467(2) states that a foreign representative may apply to the BVI court for an order (under section 467(3)) in aid of the foreign proceeding which they are administering[[95]](#footnote-95). Under section 471, an application by a foreign representative under Part XIX shall be made to the BVI court in accordance with the Insolvency Rules.[[96]](#footnote-96) The BVI courts have broad powers to order assistance in applications by foreign representatives under Part XIX.[[97]](#footnote-97) The orders that can be made are set out in section 467(3). The BVI court may:

1. “*restrain the commencement or continuation of any proceedings, execution or other legal process or the levying of any distress against a debtor or…debtor’s property*”;[[98]](#footnote-98)
2. “*restrain the creation, exercise or enforcement of any right or remedy over or against any of the debtor’s property*”;[[99]](#footnote-99)
3. “*require any person to deliver up to the foreign representative any property of the debtor or the proceeds of such property*”;[[100]](#footnote-100)
4. “*make such order or grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of a Virgin Islands insolvency proceeding with a foreign proceeding*”;[[101]](#footnote-101)
5. “*appoint an interim receiver of any property of the debtor…*”;[[102]](#footnote-102)
6. “*authorize the examination by the foreign representative of the debtor or of any person who could be examined in a Virgin Islands insolvency proceeding…*”;[[103]](#footnote-103)
7. “*stay or terminate or make any other order it considers appropriate in relation to a Virgin Islands insolvency proceeding*”;[[104]](#footnote-104) or
8. “*make such other or grant such other relief as it considers appropriate*.”[[105]](#footnote-105)

An order under section 467(3) shall not affect the right of a secured creditor to deal with the debtor’s property over which they have a security interest[[106]](#footnote-106). Section 467(5) states that the BVI court, when making an order in aid of foreign proceedings under section 467(3), is able to apply either the applicable BVI laws or the law which is applicable in the foreign proceeding[[107]](#footnote-107).

As can be seen from above, the BVI court has wide powers under section 467 when making an order in aid of foreign proceedings. For example, by authorising the examination by the foreign representative of the debtor under section 467(3)(f), a former officer of the company in liquidation may appear before the court “*for examination concerning the company, or a connected company, including the promotion, formation, business, dealings, accounts, assets, liabilities or affairs of the company or connected company*.”[[108]](#footnote-108) The court’s wide discretion in ordering assistance in foreign proceedings is further emphasised by section 467(3)(h) which states that if the court considers it appropriate, it has the power to make any such order or grant any other relief.[[109]](#footnote-109)

Section 468 - Matters to be considered by court in determining application under section 467

Notwithstanding the court’s wide discretion to grant an order in aid of foreign proceedings under section 467, it should be noted that the Part XIX regime is largely based on an “application-by-application” basis. Recognition will not provide the officeholder with the rights they would have been granted had they been appointed locally under the Insolvency Act[[110]](#footnote-110) (see below).

Section 468 sets out the matters that the BVI court is required to consider when making an order under section 467. The BVI court is to be guided by what will “*ensure the economic and expeditious administration of the foreign proceeding to the extent consistent with*”[[111]](#footnote-111):

1. “*the just treatment of all persons claiming in the foreign proceeding*”[[112]](#footnote-112);
2. “*the protection of persons in the Virgin Islands who have claims against the debtor against prejudice and inconvenience in the processing of claims in the foreign proceeding*”[[113]](#footnote-113);
3. “*the prevention of preferential or fraudulent dispositions of property subject to the foreign proceeding, or the proceeds of such property*”[[114]](#footnote-114);
4. “*the need for distributions to claimants in the foreign proceedings to be substantially in accordance with the order of distributions in a Virgin Islands insolvency*”[[115]](#footnote-115); and
5. “*comity*.”[[116]](#footnote-116)

It should be noted that an order under section 467 shall not, without the consent of the person concerned, affect the right of any creditor to set-off[[117]](#footnote-117) or result in a person who is a preferential creditor from receiving less than they would have in a BVI insolvency proceeding[[118]](#footnote-118).

Section 469 - Limitation on effect of application under Part XIX

Section 469(2) states that the BVI court may make an order under Part XIX conditional on the foreign representative complying with any other order of the court.[[119]](#footnote-119)

Section 470- Additional assistance

Section 470 states that nothing in Part XIX limits the BVI court or an insolvency officer’s power to provide additional assistance to a foreign representative where permitted under any other part of the Insolvency Act or under any other rule of law in the BVI.

**Common law**

It should be noted that even though the BVI court has wide discretion under Part XIX (section 467) of the Insolvency Act to aid a foreign representative in foreign proceedings, Part XIX does not confer any status upon the applicant – it only provides discretionary relief. In *Irving H Picard v Bernard L Madoff Investment Securities LLC (in Securities Investor Protection Act Liquidation)*[[120]](#footnote-120), the trustee applied for orders seeking, *inter alia*, recognition as a foreign representative under Part XIX. Bannister J stated that, the fundamental difference between Part XVIII (not in force yet) and Part XIX is that Part XVIII “*confers status on the foreign representative through the recognition of the foreign proceedings…whereas Part XIX merely gives a foreign representative from a relevant country express rights to apply…for orders in aid, but without conferring status*. [emphasis added]”[[121]](#footnote-121) Bannister J held that recognition was codified under Part XVIII. The concept of recognising an individual foreign representative was absent from Part XIX which meant that the consequences of making such a recognition order would be uncertain. The legislation currently in force did not envisage or empower the court to confer status in the BVI.[[122]](#footnote-122) For the court to confer authority on an applicant, the source of that authority had to be identified and the nature and extent of that power had to be strictly delimited.[[123]](#footnote-123)

Further, in *C (a bankrupt)*[[124]](#footnote-124), the Hong Kong trustees in bankruptcy applied for recognition at common law of the bankruptcy proceedings and their standing as trustees.[[125]](#footnote-125) The trustees sought, *inter alia*, that they be granted the powers that they would have had had they been appointed under the Insolvency Act. Bannister J rejected the proposition that a foreign insolvency practitioner would be granted by the BVI court the same rights and powers of an officeholder appointed under the Insolvency Act by virtue of nothing more than recognition.[[126]](#footnote-126) The court “*had no jurisdiction to confer upon a stranger powers which a statute confers only upon individuals accepting specified appointments under the statute*”.[[127]](#footnote-127)

**Conclusion**

The BVI court has a range of powers to assist in foreign proceedings. The type of assistance granted by the BVI court will depend on the facts of each specific application. As shown in the case law above, one order that the BVI court cannot grant is the recognition of a foreign insolvency practitioner’s status under Part XIX.

**Question 3.3 [maximum 5 marks]**

What is a scheme of arrangement under the Insolvency Act 2003? When can such an application be made to the Court, by whom and what are the requisites for it to be approved?

*(\* As per Sanrie Lawrenson’s email dated 7 May 2024, the answer to Question 3.3 refers to the BVI Business Companies Act 2004, and not the Insolvency Act 2003)*

In the British Virgin Islands (“**BVI**”), there are three main ways that a company can restructure or reorganise[[128]](#footnote-128). These are via a:

1. plan of arrangement - governed by the BVI Business Companies Act 2004 (as amended) (“**BCA**”);
2. schemes of arrangement – also governed by the BCA; and
3. creditors’ arrangement - governed by the Insolvency Act 2003 (“**Insolvency Act**”).

This essay will discuss schemes of arrangement under the BCA.

**Schemes of arrangement**

Schemes of arrangement are governed by section 179A of the BCA. A scheme of arrangement is a statutory mechanism that enables the “*company to enter into a compromise or arrangement between the company and its creditors, or between the company and its shareholders*.”[[129]](#footnote-129) The compromise or arrangement is proposed and the court may, on the application of persons specified under section 179A(2), order a meeting of the creditors or members (or class of either) “*to be summoned in such manner as the Court directs*.”[[130]](#footnote-130)

Section 179A(6) states that an “arrangement” includes the “*reorganisation of the company’s share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods*.”[[131]](#footnote-131)

By whom can an application be made

Section 179A(2) states that an application for a scheme of arrangement may be made by:

1. the company[[132]](#footnote-132);
2. a creditor of the company[[133]](#footnote-133);
3. a member of the company[[134]](#footnote-134);
4. the administrator (if the company is in administration)[[135]](#footnote-135);
5. the voluntary liquidator (if the company is in voluntary liquidation)[[136]](#footnote-136) or
6. the liquidator (if an Insolvency Act liquidator has been appointed).[[137]](#footnote-137)

When can an application be made to the court

An application for a scheme of arrangement can be made to court at any time. There is no requirement that the company is insolvent at the time the application to the court is made under section 197A[[138]](#footnote-138). Schemes of arrangement focus on restructuring equity[[139]](#footnote-139) and can allow the company to restructure and avoid entering into a formal insolvency process[[140]](#footnote-140). Another example of when a scheme of arrangement can be used is when the company’s directors do not have sufficient support from members or creditors in relation to a proposed action or where it is otherwise desirable to have a proposed action endorsed by the court via the scheme.[[141]](#footnote-141)

The requisites for a scheme of arrangement to be approved

A meeting will be called and the scheme proposed will be voted on[[142]](#footnote-142). Section 179A(3) states that a majority in number representing 75% in value of the creditors or members (or class of either) present and voting at the meeting need to vote in favour of any compromise or arrangement.[[143]](#footnote-143) If the requisite number of creditors or members (or class of either) vote in favour of the proposal, the applicant(s) must return to the court for the scheme’s approval.[[144]](#footnote-144)

Section 179A(3) states that if sanctioned by the court, the compromise or arrangement will be binding on all creditors or members (or class of either) as well as the company or if the company is in liquidation (voluntary or insolvent), on the liquidator and every person who is liable to contribute to the company’s assets in the event that the company is liquidated.[[145]](#footnote-145)

Post-court sanction administrative duties

Section 179A(4) states that the court order made under section 179A(3) shall not have effect until a copy of the court order has been filed with the Registrar of Corporate Affairs.[[146]](#footnote-146) Further, section 179A(5) states that the court order made under section 179A(3) shall be annexed to every copy of the company’s memorandum which is issued after the order has been made.[[147]](#footnote-147) If the company contravenes section 179A(5), the company commits an offence and will be liable on summary conviction to a $5,000 fine.[[148]](#footnote-148)

**Points to note**

A key benefit of schemes of arrangement is that once the requisite resolution has been passed by the creditors or members (or class of either) and sanctioned by the court, there are no statutory rights for dissenters[[149]](#footnote-149) (unlike in a plan of arrangement). Therefore, even though the threshold for consent is higher than for a plan of arrangement (being a majority in number representing 75% in value of the creditors or members), there is greater certainty once the threshold is reached.[[150]](#footnote-150) The court will however refuse to approve a scheme of arrangement if it considers it unfair in light of there being no statutory right for dissenters – this is even if this has already been approved by the creditors or members (or class of either).[[151]](#footnote-151) Further putting a scheme of arrangement in place is simpler than a plan of arrangement.[[152]](#footnote-152)

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

**Question 4.1 [maximum 6 marks]**

In 2019 Yellow Limited, a company incorporated in the BVI entered into a 10-year mortgage with Orange Mortgages Limited, a company registered in the UK, for a property situated in the BVI, which mortgage was due to be paid monthly. Under the terms of the mortgage, if Yellow Limited defaulted on one payment, then the mortgage was repayable immediately. Yellow Limited is now four months in arrears on the mortgage.

Providing reasons, with particular reference to the Insolvency Act 2003, answer the following question:

1. What are the options open to Orange Mortgages Limited in respect of any redress against Yellow Limited?

Orange Mortgages Limited (“**Orange**”) has the following options in respect of any redress against Yellow Limited (“**Yellow**”) for the four months arrears on the mortgage over the property (“**Property**”) situated in the British Virgin Islands (“**BVI**”):

1. Appoint a receiver;
2. Statutory demand; and
3. Debt action.

**Appoint a receiver**

The appointment of receivers in the BVI is “*commonly used as a remedy by which a secured creditor can enforce its security against assets of a company that is in financial difficulty or in breach of a debt obligation.*”[[153]](#footnote-153) Receiverships in the BVI are governed by the Insolvency Act 2003 (“**Insolvency Act**”) and Insolvency Rules 2005 (“**Insolvency Rules**”).

From the fact pattern, it is not clear if the terms of the mortgage between Orange and Yellow enables the appointment of a receiver. However, assuming it does (and this is likely as it is a commercial term to protect lenders), Orange, as a secured creditor, can enforce its security (the Property) against Yellow. Under section 115(2)(b) of the Insolvency Act, a receiver can be appointed “*under a debenture or other instrument*”[[154]](#footnote-154). Even if the mortgage does not confer on Orange the right to appoint a receiver, a receiver can also be appointed “*by the Court*” on an application under section 115(2)(a).[[155]](#footnote-155) In most cases, a receiver will be appointed out of court (rather than by the court) because it is quicker and cheaper.[[156]](#footnote-156)

Notices, notifications and other requirements for the appointment of a receiver

Section 118 states that the receiver appointed shall, forthwith upon being appointed, send notice of their appointment to the company,[[157]](#footnote-157) i.e. to Yellow and as well as file notice with the Registrar of Corporate Affairs[[158]](#footnote-158). Further, section 119 sets out the requirements in relation to the notification of the receivership. Where a company is in receivership, the documents listed in section 119(2) are to contain a statement that a receiver has been appointed.[[159]](#footnote-159) Section 119(2) includes every public document issued by or on behalf of Yellow or the receiver that relates to the Property.[[160]](#footnote-160)

If Orange appoints a receiver out of court, section 139 sets out further provisions in relation to the receiver’s appointment, including the receiver (if they accept the appointment) confirming within 7 days their acceptance in writing to the Orange.[[161]](#footnote-161)

Powers of the receiver

Under section 127, the receiver (if appointed out of court), has the powers expressly or impliedly conferred on them[[162]](#footnote-162) by the charge or instrument by which they were appointed[[163]](#footnote-163) (or the court order if appointed by the court)[[164]](#footnote-164). Unless the charge or instrument (or court order if applicable) provides otherwise, the receiver appointed may, *inter alia*, demand and recover (by action or otherwise) income of the assets in respect of which they were appointed[[165]](#footnote-165).

The fact pattern does not state what the powers of any receiver appointed under the mortgage between Orange and Yellow are. If a receiver is appointed by way of court application, the court order should be drafted carefully as a court appointed receiver’s powers are derived from the court order.[[166]](#footnote-166) There should be a power of sale included.

General duties of the receiver

Under section 128, the receiver’s primary duty is to exercise their power in good faith and for a proper purpose[[167]](#footnote-167) as well as in a way they believe (on reasonable grounds) are in the best interests of the person in whose interest they were appointed[[168]](#footnote-168), i.e. Orange. To the extent consistent with these powers, the receiver shall exercise their powers with reasonable regard to, *inter alia*, the interests of Yellow’s creditors and Yellow itself.[[169]](#footnote-169)

Powers of sale

If the receiver appointed exercises a power of sale of the Property, there is a duty to obtain the best price reasonably obtainable at the time of the sale. This duty is owed to Yellow[[170]](#footnote-170).

Advantages of appointing a receiver

The advantages for Orange of a receiver being appointed are that:

1. under section 126(1), a receiver appointed out of court will be deemed to be Yellow’s agent unless the mortgage under which they were appointed expressly states otherwise[[171]](#footnote-171). Without requiring it to go into possession, Orange, as mortgagee, can ensure, via the receiver, that the Property is managed and protected properly[[172]](#footnote-172). Further, a receiver appointed by the court is an agent of the court (and not of Yellow)[[173]](#footnote-173);
2. appointing a receiver might put Yellow under economic pressure. The receiver will divert rent and profit away from Yellow (debtor), and therefore can create further cash flow problems for Yellow. As the receiver is at arms-length from Orange (and not its agent), the receiver can deal with the Property without Orange being at risk of allegations of bad faith or self-dealing[[174]](#footnote-174). This would also apply to a court appointed receiver (as they are the agent of the court); and
3. as Yellow has defaulted, there might be cashflow issues, and insolvency proceedings initiated by other creditors might be imminent. The appointment of a receiver will not be terminated by any liquidation and so Orange can sell the secured asset during any insolvency process.[[175]](#footnote-175) Receiverships “*contrasts with liquidation in that it is not a collective insolvency procedure for the benefit of the general body of creditors or the company*.”[[176]](#footnote-176) Orange’s claim will be directly against the Property and would therefore fall outside any liquidation.[[177]](#footnote-177) The Insolvency Act specifically recognises and protects a secured creditor’s right to enforce its security.[[178]](#footnote-178) The Property can be realised with the proceeds distributed to Orange (to the extent of the debt).

**Statutory demand**

As an alternative to appointing a receiver, Orange may, under section 155(1) of the Insolvency Act, make a demand on Yellow for payment of the debt owed. The demand shall, *inter alia*:

1. “*be in respect of a debt that is due and payable…and that is not less than the prescribed minimum* [emphasis added]”[[179]](#footnote-179);
2. be in writing and shall state the nature of the debt and the amount due[[180]](#footnote-180);
3. require Yellow to pay the debt or to secure or compound for the debt to Orange’s reasonable satisfaction within 21 days of the date of service of the demand[[181]](#footnote-181); and
4. state that if the demand is not complied with, an application may be made to the court to appoint a liquidator[[182]](#footnote-182).

If Orange serves a statutory demand for the four months arrears on the mortgage, it would be making the demand as a secured creditor in respect of the debt. In this situation, section 155(3) provides that the demand shall specify the full amount of the debt but:

1. the demand shall specify the nature of the security interest (i.e. a mortgage), and the value Orange (as the creditor) places on it at the date of the demand[[183]](#footnote-183); and
2. the amount claimed “*shall be the full amount of the debt less the amount specified as the value of the security interest and shall equal or exceed the prescribed minimum*. [emphasis added]”[[184]](#footnote-184)

The demand shall be for the prescribed minimum[[185]](#footnote-185) which, as per rule 149(1) of the Insolvency Rules, is $2,000[[186]](#footnote-186). Although the fact pattern does not state the amount of monthly mortgage payments or how much Yellow is in arrears, it is assumed that the amount owed to Orange is over the minimum threshold of $2,000 and therefore Orange can issue a statutory demand.

Yellow, as a BVI company, will be considered insolvent (under the statutory test set out in section 8(1)(a)) if it does not set aside the statutory demand and fails to comply with its requirements[[187]](#footnote-187). The fairly short window of 21 days (of the date of service) to pay or secure or compound the debt to the reasonable satisfaction of Orange is an effective way for Orange to put pressure on Yellow to settle the amount in arrears, especially as an application can be made to court to wind up the company and appoint a liquidator[[188]](#footnote-188).

**Debt action**

A further option for Orange is to sue in contract on Yellow’s covenants to repay the mortgage sum. An advantage of a debt action is that it would enable Orange, as mortgagee, to enforce against Yellow’s other assets (if any) without limiting itself at first to the Property.[[189]](#footnote-189) Yellow would be considered insolvent if it fails to satisfy (wholly or partly) execution or other process issued on a judgment of the BVI court in favour of Orange as the creditor of the company.[[190]](#footnote-190)

It is not known from the fact pattern whether the mortgage payments in arrears is disputed between Orange and Yellow. This will determine whether a statutory demand or debt action is the most appropriate course of action. It is assumed that the four months default in mortgage payments is not disputed and therefore a statutory demand would be more appropriate.[[191]](#footnote-191)

1. What would be the options available to Orange Mortgages if the loan was unsecured?

The following options are available to Orange if the loan was unsecured:

1. Statutory demand; and
2. Debt action.

**Statutory demand**

Similar to Question 4.1(a) above, Orange can make a written demand on Yellow for payment of the debt (in this situation, the unsecured sum) owed to it. The same rules set out above will apply apart from the fact that Orange will be making the demand on an unsecured debt and therefore the requirements set out in section 155(3) will not apply as Orange would not be a secured creditor in this scenario.

Assuming the four months arrears is over the presided minimum[[192]](#footnote-192) of $2,000[[193]](#footnote-193) and a statutory demand is issued by Orange, Yellow will have 21 days (from the date of service) to pay or secure or compound the debt to the reasonable satisfaction Orange, especially as an application can be made to court to wind up Yellow and appoint a liquidator[[194]](#footnote-194). Yellow, as a BVI company, will be considered insolvent (under the statutory test set out in section 8(1)(a)) if it does not set aside the statutory demand and fails to comply with its requirements[[195]](#footnote-195). The court may, on application by Orange (as a creditor)[[196]](#footnote-196), appoint a liquidator over Yellow[[197]](#footnote-197) as it would be insolvent[[198]](#footnote-198) according to the statutory test. The *pari passu* principle would apply under the Insolvency Act. In light of this, all unsecured creditors (including Orange in this scenario) of the insolvent company (Yellow) which is liquidated will “*share equally and rateably in the assets of the company (that are not subject to a valid security interest) remaining after payment of any preferential claims and the liquidation expenses*.”[[199]](#footnote-199)

**Debt action**

As stated above, it is not known from the fact pattern whether the four months in arrears on the mortgage is disputed between Orange and Yellow. If it is not disputed, the statutory demand route (see above) would be more appropriate. However, if it is genuinely disputed, a debt action would be a more appropriate course of action. In the event that Orange obtains judgment from the BVI court following a debt action, Yellow would be considered insolvent if it fails to satisfy (wholly or partly) execution or other process issued on the judgment.[[200]](#footnote-200)

**Question 4.2 [maximum 9 marks]**

In 2023 Owed Limited, a company registered in England, was awarded a judgment for an unsecured debt in the English High Court against Indebted Limited, also incorporated in England, of GBP 10 million. In an attempt to enforce its judgment, Owed Limited has discovered that Indebted Limited’s only asset is a 100% owned subsidiary, Subco Limited, a company incorporated in the BVI, which itself owns a number of unencumbered properties in the BVI but has been struck off of the Register and is now dissolved. The sole shareholder and sole director of Indebted Limited has recently passed away.

You have been tasked by your principal to prepare a memorandum to advise Owed Limited to assist it in recovering the judgement debt by detailing:

1. the number of obstacles Owed Limited has to overcome first before any recovery is possible; and
2. its options to recover the judgment debt owed by Indebted Limited.

**Memorandum**

**To:** Owed Limited

**From:** 202324-1433

**Date:** 21 June 2024

**Subject line:** Recovery of judgment debt

This memorandum is intended to assist Owed Limited (“**Owed**”) in recovering the judgment debt against Indebted Limited (“**Indebted**”). In 2023, Owed was awarded judgment for an unsecured debt in the English High Court against Indebted of GBP 10 million (“**English Judgment**”). This memorandum will address the following points:

1. the obstacles Owed has to overcome first before any recovery is possible; and
2. Owed’s options to recover the judgment debt owed by Indebted.

**Obstacle 1 - Registration of English Judgment**

As a first step, the English Judgment (as a foreign judgment) will need to be recognised in the British Virgin Islands (“**BVI**”). This “*effectively provides the judgment creditor with a BVI judgment on the same terms as the foreign judgment. The judgment can then be enforced in the same way as any other BVI judgment*.”[[201]](#footnote-201) The power to recognise foreign judgments in the BVI is based on the Reciprocal Enforcement of Judgments Act 1922 (“**1922 Act**”) and the common law. The 1922 Act is the most commonly used procedure but only applies to certain jurisdictions[[202]](#footnote-202) including judgments from the High Court of England and Wales.

It is helpful that Indebted has an asset in the BVI (the 100% owed subsidiary, Subco Limited (“**Subco**”)) as the enforcement of a foreign judgment in the BVI is only effective if the judgment debtor has assets in the jurisdiction (against which to enforce).[[203]](#footnote-203) Section 2 of the 1922 Act defines a judgment as one “*given or made by a court in any civil proceedings…whereby any sum of money is made payable*”.[[204]](#footnote-204) From the fact pattern, the English Judgment is final and is for a conclusive monetary sum (GBP 10 million) and so therefore can be enforced in the BVI.

Another key provision is section 3(1). The English Judgment has to be registered by Owed (judgment creditor) within 12 months after the date of the judgment.[[205]](#footnote-205) The English Judgment was obtained in 2023. As of the date of this memorandum (21 June 2024), it is not certain if the 12-month period for registering the English Judgment has expired. Notwithstanding this, the court may permit a longer period of registering a judgment.[[206]](#footnote-206) The court may, if it considers it just and convenient that judgment should be enforced in the BVI, order the judgment to be registered.[[207]](#footnote-207) To register the English Judgment, an application to court will need to be made by Owed under Part 74 (Reciprocal Enforcement of Judgments) of the Eastern Caribbean Supreme Court Civil Procedure Rules 2023 (“**CPR**”). CPR Part 74.2 states that the application can be made without notice but must be supported by affidavit. To comply with the CPR Part 74.2 requirements, the affidavit on behalf of Owed will have to, *inter alia*:

1. exhibit the English Judgment or a verified, certified or otherwise duly authenticated copy of it[[208]](#footnote-208); and
2. state to the best of the information or belief of the deponent that Owed is entitled to enforce the English Judgment and the amount remains unsatisfied.[[209]](#footnote-209)

It should be noted that the court may, under CPR Part 74.3, order Owed “*to give security for the costs of* *the application for registration and of any proceedings which may be brought to set aside the registration*.”[[210]](#footnote-210) Further, an application to set aside the registration of the English Judgment can be made by Indebted under CPR Part 74.7.

The court office must keep a register of the judgments which are ordered to be registered.[[211]](#footnote-211) In the event that the English Judgment is registered, notice of the registration must be served on Indebted as the judgment debtor.[[212]](#footnote-212) Once the English Judgment is registered under the 1922 Act, it will be treated (from the date of registration), as being of the same force and effect as if such judgment was obtained in the BVI[[213]](#footnote-213). This would mean all the remedies for enforcing money judgments under CPR Part 45.2 would be available, including appointing a receiver under CPR Part 51[[214]](#footnote-214) (see below).

**Obstacle 2 - Shareholding and directorship of Indebted**

Another obstacle for Owed is that the sole shareholder and sole director of Indebted has recently passed away. Indebted is incorporated in England and Wales. Under English law, a company’s business and affairs are usually conducted by the director(s) and they are usually appointed by the member(s) or director(s). The death of Indebted’s sole shareholder and sole director has two consequences - firstly no one is able to carry on its business and affairs, and secondly, no one can be appointed in place of the deceased individual. As a minimum, a new member would need to be entered onto the register of members and a new director appointed.

Shareholding

If the shareholder died with a valid will appointing executors, the administrators would, upon the grant of probate being issued, become the personal representatives. If the shares in Indebted were registered in the deceased’s name, the legal title would vest automatically in the personal representatives. In the absence of a valid will or one that appoints executors, the estate cannot be administered until there is a grant of representation (and the shares will not vest in the administrators until the grant). Once authority is established (either as executors or administrators), Indebted’s articles of association should be checked to determine how the personal representatives can be registered as a member of the company.[[215]](#footnote-215)

Directorship

An English company must have at least one director. How Indebted’s new director is appointed would depend on when it was incorporated – i.e. under the United Kingdom Companies Act 1985 (“**1985 Act**”) (i.e. before 1 October 2009) or Companies Act 2006 (“**2006 Act**”).

If Indebted was incorporated under the 1985 Act and had adopted Table A articles, the personal representatives would not have the automatic authority to appoint a new director – they would need to be added to the register of members (which cannot be done until a grant of probate is issued). Once added, they would then pass a resolution appointing a new director. This will then mean that the company can continue its normal activities. Obtaining a grant of probate can be a lengthy process.[[216]](#footnote-216)

If Indebted was incorporated under the 2006 Act and had adopted the model articles, then model article 17(2) is relevant. It states that where, as a result of death, a company has no shareholders and no directors, the personal representatives of the last shareholder to have died will have the right (by notice in writing) to appoint a director[[217]](#footnote-217) (of Indebted). This would avoid the need for protracted court applications and means Indebted can operate normally.

If Indebted has adopted bespoke articles, the articles would need to be reviewed to see if it allows the personal representative to appoint a new director.[[218]](#footnote-218) The situation is complicated if the articles prohibit the personal representatives from appointing a new director. This can make it difficult to register new members. Under the 2006 Act, a member will not be recognised as the legal owner of shares until they are entered onto the register of members. If there is no (surviving) director, the register of members cannot be updated.[[219]](#footnote-219) Section 125 contains a possible solution. Section 125 states that if a company’s register of members does not include information that is required or it includes information that is not required, “*the person aggrieved, or any member of the company, or the company, may apply to the court for rectification of the register*.”[[220]](#footnote-220) In Ellott v Cimarron UK Ltd [2017][[221]](#footnote-221), the executor did not have the authority to vote on a resolution to appoint new directors. The company’s articles (Table A) meant that the executor would have had to wait for the grant of probate to be issued before he could appoint new directors. The English High Court ordered rectification of the company’s register of members - this was to replace the deceased sole shareholder and sole director with the executor after an application for a grant of probate (but before the grant was obtained).[[222]](#footnote-222) The rationale for this was that the court had considered the potential risk to the company which arose from its inability to trade – this justified the granting of the order.

**Obstacle 3 - Restoration of Subco**

Another obstacle that Owed has to overcome is the fact that Subco has a number of unencumbered BVI properties but has been struck off the BVI Register of Companies (“**Register**”) and is dissolved. Subco’s assets have vested in the Crown *bona vacantia* and will need to be returned to Subco (before Owed can try and recover the judgment debt owed by Indebted). Subco will need to be restored to the Register. It is unclear from the fact pattern:

1. when Subco was struck off and dissolved;
2. why it was struck off and dissolved; and
3. if it was carrying on business or in operation when it was struck off and dissolved.

With the commencement of the BVI Business Companies (Amendment) Act 2022 (“**Amendment Act**”) on 1 January 2023, the date Subco was struck off and dissolved is important as it will determine how Subco will be restored to the Register:

Struck off and dissolved before 1 January 2023

A company dissolved before 1 January 2023 can be restored to the Register. Any application to restore a dissolved company has to be made within 10 years after the date of dissolution and could be made by a creditor, former director, former member, former liquidator or any person who could establish an interest in the company being restored[[223]](#footnote-223).

Transitional arrangements

The Amendment Act contains transitional arrangements. A company which, as of 1 January 2023, was dissolved will have until 1 January 2028 to apply to restore the company unless:

* 1. the 10-year period (see above) ended before this date, in which case the deadline would be the earlier date; or
	2. the 10-year period is due to end after 1 January 2028, in which case 1 January 2028 would be the deadline for applying for restoration.[[224]](#footnote-224)

Struck off and dissolved after 1 January 2023

After 1 January 2023, a company which is struck off for administrative reasons will have only 90 days to settle any outstanding fees and penalties and be restored. Failing to do this will mean that the Registrar may publish a notice striking off the company in the BVI Gazette.[[225]](#footnote-225) The process of strike off and dissolution now almost happens simultaneously.[[226]](#footnote-226) Assuming Subco was struck off and dissolved after 1 January 2023, it can be restored either by:

1. the Registrar of Corporate Affairs (“**Registrar**”) (under section 217); or
2. by the court (under section 218).

Section 217 and section 218 restorations are determined by whether the company was struck off and dissolved after the conclusion of its liquidation (whether voluntary or involuntary)[[227]](#footnote-227) and whether the company was carrying on business or in operation at the time of its dissolution.[[228]](#footnote-228) As stated above, it is unclear when Subco was struck off and dissolved, or why it was struck off and dissolved or whether it was carrying on business or in operation at the time. More information is therefore needed in relation to these questions. Notwithstanding this, an application for restoring a struck off and dissolved company via the Registrar or the court is five years[[229]](#footnote-229) of the date of the company’s dissolution. If the dissolved company is restored, the company is deemed to have never been struck off and dissolved[[230]](#footnote-230).

The company, a creditor, a member or liquidator of the company[[231]](#footnote-231) has standing to apply to restore Subco to the Register by the Registrar. A creditor, former director, former member or former liquidator of Subco[[232]](#footnote-232) or any other person who can establish an interest in having Subco restored to the Register[[233]](#footnote-233) can apply to the court to restore Subco.

As the property of Subco has vested in the Crown *bona vacantia*, any application to restore the company (whether via section 217 or section 218) will need to include the Crown’s consent to the company’s restoration (via the Financial Secretary) or the Financial Secretary’s refusal to consent to the application or whether the Financial Secretary has failed to respond to a request within 7 days to give the Crown’s consent.[[234]](#footnote-234)

**Recovering the judgment debt owed by Indebted**

Assuming the English Judgment is registered, Indebted has a new director appointed and Subco is restored to the Register, the next step for Owed to take to recover the judgment debt is by appointing a receiver in aid of equitable execution of the English Judgment. Such a tool is “*very helpful where the debtor holds assets through…corporate entities*.”[[235]](#footnote-235)

*Industrial Bank Financial Limited Leasing Co Ltd v Xing Libin*[[236]](#footnote-236) (“***Xing Libin***”)

The position of Owed, Indebted and Subco is similar to that of *Xing Libin*. *Xing Libin* involved a BVI company called Firstwealth Holdings Ltd (“**Firstwealth**”) which was 100% owned by the defendant. The claimant sought to appoint equitable receivers “*over all issued shares in [Firstwealth], its business and undertaking and any and all rights the company may have whatsoever and howsoever found*.”[[237]](#footnote-237) The claimant had obtained three monetary judgments against the defendant in the People’s Republic of China. By orders of the High Court of the Hong Kong Special Administrative Region, these judgments were registered in Hong Kong. The claimant then applied for the judgments to be recognised in the BVI.

*Xing Libin* reaffirmed the position that equitable receivers by way of execution would be appointed where there were “*special circumstances*” which rendered it just and convenient to do so when it would otherwise be difficult to enforce judgment in any other way and that the appointment of a receiver was the only realistic prospect for the judgment creditor to enforce its judgment.[[238]](#footnote-238) It was held that Firstwealth’s assets were the *de facto* control of the defendant so that appointing an equitable receiver of its assets would be (at least potentially) legally permissible. Firstwealth’s assets were, however, not under the *de jure* ownership of the defendant. It was “*trite law that the assets of a company are not the assets of even a 100% shareholder*”.[[239]](#footnote-239) In light of this, the BVI court held that an:

“*equitable receiver can be appointed over the shares. He can then use his powers as receiver to replace the existing director with a new director, usually himself. He can then use his power as a director to convert the assets of the company into money. Alternatively, he can put the company into voluntary liquidation.*”[[240]](#footnote-240)

The court in *Xing Libin* appointed equitable receivers over the shares in Firstwealth (but not over any and all rights Firstwealth may have as a company’s rights are not the assets of a sole shareholder, so there is no jurisdiction to appoint a receiver over those assets.)

Appointment of receiver by way of court application

Pursuant to CPR Part 51, an application by Owed to appoint a receiver must be supported by evidence on affidavit[[241]](#footnote-241). It may be necessary to (in the same application) apply for an injunction to restrain Subco (or Indebted) from assigning, charging or otherwise dealing[[242]](#footnote-242) with the BVI properties. More information is needed on the risk of dissipation of the BVI properties.

Owed would need to satisfy the court that the usual methods of enforcing a judgment are inadequate (i.e. the defendant/judgment debtor Indebted only has one asset which is Subco who in turn owns a number of BVI properties). The BVI court has demonstrated flexibility to appointing receivers and has showed a willingness to appoint receivers in aid of the equitable execution of judgments.[[243]](#footnote-243) Owed will need to make an application to the court for a final order for an appointment of an equitable receiver. A final order is a form of execution in itself.[[244]](#footnote-244) As discussed by Justice Jack in *VTB Bank (Public Joint Stock Company) v Miccros Group Ltd and another*[[245]](#footnote-245) (***Miccros***), the “*judgment creditor must prove on balance of probabilities that* *the asset in respect of which the receiver is appointed is owned legally or beneficially by the judgment debtor*.”[[246]](#footnote-246) Applying *Miccros* to Owed’s situation, this should not be difficult to prove given that the fact pattern informs us that Subco is a 100% owed subsidiary of Indebted.

The court, in its discretion to appoint a receiver to recover a judgment debt, must have regard to the amount likely to be obtained, the amount of the judgment debt and the probable cost of appointing and remunerating the receiver[[247]](#footnote-247). A court appointed receiver is an officer of the court and will have the powers set out in the order which appointed them.[[248]](#footnote-248) A person generally cannot be appointed receiver until they have given security[[249]](#footnote-249). The order which appoints the receiver must state the amount of security to be given[[250]](#footnote-250) and the security must be by guarantee (unless the court allows some other form of security)[[251]](#footnote-251).

Receiver’s options

Assuming an equitable receiver is appointed over the shares of Subco, the final step for Owed (applying *Xing Libin*) to recover the judgment debt is for the receiver to either:

use his powers as receiver to replace Subco’s existing director(s) with new director(s), for example, himself, and use his power as a director to convert Subco’s assets into money; or

place Subco into voluntary liquidation.

In the event of Subco’s liquidation, Subco’s assets (i.e. the unencumbered BVI properties) are to be distributed as per section 207(1) of the Insolvency Act 2003. This would mean that Subco’s preferential creditors will be paid before the English Judgment amount is recovered.

**\* End of Assessment \***

1. Charlotte Walker, text updated for 2022/2023 and 2023/2024 by Janet Watson, “INSOL International, Foundation Certificate in International Insolvency Law, Module 5B Guidance Text, British Virgin Islands, 2023/2024”, p 14 [↑](#footnote-ref-1)
2. Insolvency Act 2003, section 2 [↑](#footnote-ref-2)
3. Ibid., section 482(1)(a) [↑](#footnote-ref-3)
4. Ibid., section 482(1)(b) [↑](#footnote-ref-4)
5. Ibid., section 482(1)(c) [↑](#footnote-ref-5)
6. Ibid., section 482(1)(d)(i) and section 482(2) [↑](#footnote-ref-6)
7. Ibid., section 482(1)(d)(ii) and section 482(3) [↑](#footnote-ref-7)
8. Ibid., section 482(1)(e) [↑](#footnote-ref-8)
9. Charlotte Walker, text updated for 2022/2023 and 2023/2024 by Janet Watson, “INSOL International, Foundation Certificate in International Insolvency Law, Module 5B Guidance Text, British Virgin Islands, 2023/2024”, p 16 [↑](#footnote-ref-9)
10. Ibid., p 33 [↑](#footnote-ref-10)
11. Insolvency Act 2003, section 155(2)(a) [↑](#footnote-ref-11)
12. Insolvency Rules 2005, rule 149(1) [↑](#footnote-ref-12)
13. Insolvency Act 2003, section 155(2)(b) [↑](#footnote-ref-13)
14. Ibid., section 155(2)(f) [↑](#footnote-ref-14)
15. Ibid., section 155(1) [↑](#footnote-ref-15)
16. BVI Business Companies Act 2004, section 91(1) [↑](#footnote-ref-16)
17. Ibid., section 91(5) [↑](#footnote-ref-17)
18. Ibid., section 91A(1) [↑](#footnote-ref-18)
19. Ibid., section 91(6) [↑](#footnote-ref-19)
20. Ibid., section 213(1)(a)(i) [↑](#footnote-ref-20)
21. Ibid., section 91(3)(a) [↑](#footnote-ref-21)
22. Ibid., section 91(3)(b) [↑](#footnote-ref-22)
23. Insolvency Act 2003, section 159(1)(a) [↑](#footnote-ref-23)
24. Ibid., section 159(1)(b) [↑](#footnote-ref-24)
25. Ibid., section 162(1)(a) [↑](#footnote-ref-25)
26. Ibid., section 162(1)(b) [↑](#footnote-ref-26)
27. Ibid., section 162(1)(c) [↑](#footnote-ref-27)
28. Ibid., section 162(2)(a) [↑](#footnote-ref-28)
29. Ibid., section 162(2)(b) [↑](#footnote-ref-29)
30. Ibid., section 162(2)(c) [↑](#footnote-ref-30)
31. Ibid., section 162(2)(d) [↑](#footnote-ref-31)
32. Ibid., section 162(2)(e) [↑](#footnote-ref-32)
33. Ibid., section 162(2)(f) [↑](#footnote-ref-33)
34. Ibid., section 168(1) [↑](#footnote-ref-34)
35. Ibid., section 168(2) [↑](#footnote-ref-35)
36. Ibid., section 168(2)(a) [↑](#footnote-ref-36)
37. Ibid., section 168(2)(b) [↑](#footnote-ref-37)
38. Ibid., section 162(3) [↑](#footnote-ref-38)
39. Charlotte Walker, text updated for 2022/2023 and 2023/2024 by Janet Watson, “INSOL International, Foundation Certificate in International Insolvency Law, Module 5B Guidance Text, British Virgin Islands, 2023/2024”, p 35 [↑](#footnote-ref-39)
40. Insolvency Act 2003, section 162(4) [↑](#footnote-ref-40)
41. Ibid., section 162(5) [↑](#footnote-ref-41)
42. Ibid., section 163(1)(a) [↑](#footnote-ref-42)
43. Ibid., section 163(1)(b) [↑](#footnote-ref-43)
44. Ibid., section 163(1)(c) [↑](#footnote-ref-44)
45. Ibid., section 163(1)(d) [↑](#footnote-ref-45)
46. Ibid., section 163(1)(e) [↑](#footnote-ref-46)
47. Ibid., section 163(1)(f) [↑](#footnote-ref-47)
48. Ibid., section 163(2)(a) [↑](#footnote-ref-48)
49. Ibid., section 163(2)(b) [↑](#footnote-ref-49)
50. Ibid., section 163(2)(c) [↑](#footnote-ref-50)
51. Ibid., section 162(2)(a) [↑](#footnote-ref-51)
52. Ibid., section 162(2)(b) [↑](#footnote-ref-52)
53. Ibid., section 162(2)(c) [↑](#footnote-ref-53)
54. Ibid., section 162(2)(d) [↑](#footnote-ref-54)
55. Ibid., section 162(2)(e) [↑](#footnote-ref-55)
56. Ibid., section 162(2)(f) [↑](#footnote-ref-56)
57. Ibid., section 163(3A) [↑](#footnote-ref-57)
58. Ibid., section 163(3B) [↑](#footnote-ref-58)
59. Charlotte Walker, text updated for 2022/2023 and 2023/2024 by Janet Watson, “INSOL International, Foundation Certificate in International Insolvency Law, Module 5B Guidance Text, British Virgin Islands, 2023/2024”, p 29 [↑](#footnote-ref-59)
60. Maples Group, Analysis & Insights, “BVI Voluntary Liquidations Now Require a Locally Resident Voluntary Liquidator”, <https://maples.com/en/knowledge-centre/2022/12/bvi-voluntary-liquidations-now-require-a-locally-resident-voluntary-liquidator>, published on 7 December 2022, accessed on 21 June 2024 [↑](#footnote-ref-60)
61. BVI Business Companies (Amendment) Act 2022, section 2(1) [↑](#footnote-ref-61)
62. Ibid., section 2(2) [↑](#footnote-ref-62)
63. Ibid., section 2(3)(a) [↑](#footnote-ref-63)
64. Ibid., section 2(3)(b) [↑](#footnote-ref-64)
65. Ibid., section 2(4) [↑](#footnote-ref-65)
66. Elizabeth Killeen, Carey Olsen, “Amendments to the BVI Business Companies Act”, <https://www.careyolsen.com/insights/briefings/amendments-bvi-business-companies-act>, published on 9 December 2022, accessed on 21 June 2024 [↑](#footnote-ref-66)
67. BVI Business Companies (Amendment) Regulations 2022, regulation 19(1)(a) [↑](#footnote-ref-67)
68. Ibid., regulation 19(1)(b) [↑](#footnote-ref-68)
69. Ibid., regulation 19(1A)(a) [↑](#footnote-ref-69)
70. Ibid., regulation 19(1A)(b) [↑](#footnote-ref-70)
71. Ibid., regulation 19(1A)(c)(i) [↑](#footnote-ref-71)
72. Ibid., regulation 19(1A)(c)(ii) [↑](#footnote-ref-72)
73. Ibid., regulation 19(1A)(d) [↑](#footnote-ref-73)
74. Charlotte Walker, text updated for 2022/2023 and 2023/2024 by Janet Watson, “INSOL International, Foundation Certificate in International Insolvency Law, Module 5B Guidance Text, British Virgin Islands, 2023/2024”, p 30 [↑](#footnote-ref-74)
75. BVI Business Companies (Amendment) Regulations 2022, regulation 19(2)(h) [↑](#footnote-ref-75)
76. BVI Business Companies (Amendment) Act 2022, section 199(1)(a) [↑](#footnote-ref-76)
77. Ibid., section 199(1)(b) [↑](#footnote-ref-77)
78. Ibid., section 199(2)(d) [↑](#footnote-ref-78)
79. Ibid., section 199(3)(a) [↑](#footnote-ref-79)
80. Ibid., section 199(3)(b) [↑](#footnote-ref-80)
81. Ibid., section 200(3)(a) [↑](#footnote-ref-81)
82. Ibid., section 200(3)(b) [↑](#footnote-ref-82)
83. Ibid., section 200(4) [↑](#footnote-ref-83)
84. Ibid., section 200(3A) [↑](#footnote-ref-84)
85. Ibid., section 204(1)(a)(i) [↑](#footnote-ref-85)
86. Ibid., section 204(1)(a)(ii) [↑](#footnote-ref-86)
87. Ibid., section 204(1)(a)(iii) [↑](#footnote-ref-87)
88. Ibid., section 204(1)(b) [↑](#footnote-ref-88)
89. Ibid., section 204(3) [↑](#footnote-ref-89)
90. Ibid., section 204(4) [↑](#footnote-ref-90)
91. Charlotte Walker, text updated for 2022/2023 and 2023/2024 by Janet Watson, “INSOL International, Foundation Certificate in International Insolvency Law, Module 5B Guidance Text, British Virgin Islands, 2023/2024”, p 61 [↑](#footnote-ref-91)
92. Ibid. [↑](#footnote-ref-92)
93. Insolvency Act 2003, section 466(1) [↑](#footnote-ref-93)
94. Ibid. [↑](#footnote-ref-94)
95. Ibid., section 467(2) [↑](#footnote-ref-95)
96. Ibid., section 471 [↑](#footnote-ref-96)
97. Mourant, Guide, “Recognition of foreign insolvency proceedings and foreign insolvency practitioners in the BVI”, [https://www.mourant.com/file-library/media---2017/2017-guides/recognition-of-foreign-insolvency-proceedings-and-foreign-insolvency-practitioners-in-the-bvi-(updated).pdf](https://www.mourant.com/file-library/media---2017/2017-guides/recognition-of-foreign-insolvency-proceedings-and-foreign-insolvency-practitioners-in-the-bvi-%28updated%29.pdf), published in April 2017, accessed on 21 June 2024 [↑](#footnote-ref-97)
98. Insolvency Act 2003, section 467(3)(a) [↑](#footnote-ref-98)
99. Ibid., section 467(3)(b) [↑](#footnote-ref-99)
100. Ibid., section 467(3)(c) [↑](#footnote-ref-100)
101. Ibid., section 467(3)(d) [↑](#footnote-ref-101)
102. Ibid., section 467(3)(e) [↑](#footnote-ref-102)
103. Ibid., section 467(3)(f) [↑](#footnote-ref-103)
104. Ibid., section 467(3)(g) [↑](#footnote-ref-104)
105. Ibid., section 467(3)(h) [↑](#footnote-ref-105)
106. Ibid., section 467(4) [↑](#footnote-ref-106)
107. Ibid., section 467(5) [↑](#footnote-ref-107)
108. Ibid., section 284(1) [↑](#footnote-ref-108)
109. Ibid., section 467(3)(h) [↑](#footnote-ref-109)
110. Mourant, Guide, “Recognition of foreign insolvency proceedings and foreign insolvency practitioners in the BVI”, [https://www.mourant.com/file-library/media---2017/2017-guides/recognition-of-foreign-insolvency-proceedings-and-foreign-insolvency-practitioners-in-the-bvi-(updated).pdf](https://www.mourant.com/file-library/media---2017/2017-guides/recognition-of-foreign-insolvency-proceedings-and-foreign-insolvency-practitioners-in-the-bvi-%28updated%29.pdf), published in April 2017, accessed on 21 June 2024 [↑](#footnote-ref-110)
111. Insolvency Act 2003, section 468(1) [↑](#footnote-ref-111)
112. Ibid., section 468(1)(a) [↑](#footnote-ref-112)
113. Ibid., section 468(1)(b) [↑](#footnote-ref-113)
114. Ibid., section 468(1)(c) [↑](#footnote-ref-114)
115. Ibid., section 468(1)(d) [↑](#footnote-ref-115)
116. Ibid., section 468(1)(e) [↑](#footnote-ref-116)
117. Ibid., section 468(2)(a) [↑](#footnote-ref-117)
118. Ibid., section 468(2)(b) [↑](#footnote-ref-118)
119. Ibid., section 469(2) [↑](#footnote-ref-119)
120. BVIHCV0140 of 2010 [↑](#footnote-ref-120)
121. Ibid., paragraph 7 [↑](#footnote-ref-121)
122. Ibid., paragraph 8 [↑](#footnote-ref-122)
123. Ibid., paragraph 9 [↑](#footnote-ref-123)
124. BVIHC (COM) 80 of 2013 [↑](#footnote-ref-124)
125. Charlotte Walker, text updated for 2022/2023 and 2023/2024 by Janet Watson, “INSOL International, Foundation Certificate in International Insolvency Law, Module 5B Guidance Text, British Virgin Islands, 2023/2024”, p 63 [↑](#footnote-ref-125)
126. BVIHC (COM) 80 of 2013, paragraph 20 [↑](#footnote-ref-126)
127. Ibid., paragraph 15 [↑](#footnote-ref-127)
128. Charlotte Walker, text updated for 2022/2023 and 2023/2024 by Janet Watson, “INSOL International, Foundation Certificate in International Insolvency Law, Module 5B Guidance Text, British Virgin Islands, 2023/2024”, p 56 [↑](#footnote-ref-128)
129. Ibid., p 58 [↑](#footnote-ref-129)
130. BVI Business Companies Act 2004 (as amended), section 179A(1) [↑](#footnote-ref-130)
131. Ibid., section 179A(6) [↑](#footnote-ref-131)
132. Ibid., section 179A(2)(a) [↑](#footnote-ref-132)
133. Ibid., section 179A(2)(b) [↑](#footnote-ref-133)
134. Ibid., section 179A(2)(c) [↑](#footnote-ref-134)
135. Ibid., section 179A(2)(d) [↑](#footnote-ref-135)
136. Ibid., section 179A(2)(e) [↑](#footnote-ref-136)
137. Ibid., section 179A(2)(f) [↑](#footnote-ref-137)
138. Charlotte Walker, text updated for 2022/2023 and 2023/2024 by Janet Watson, “INSOL International, Foundation Certificate in International Insolvency Law, Module 5B Guidance Text, British Virgin Islands, 2023/2024”, p 58 [↑](#footnote-ref-138)
139. Ibid., p 56 [↑](#footnote-ref-139)
140. Ibid., p 58 [↑](#footnote-ref-140)
141. Carey Olsen, “Plans and schemes of arrangement in the British Virgin Islands”, <https://www.careyolsen.com/sites/default/files/CO_BVI_CORP_Plans%20and%20schemes%20of%20arrangement%20in%20the%20BVI_3.17_0.pdf>, published in March 2017, accessed on 21 June 2024 [↑](#footnote-ref-141)
142. Charlotte Walker, text updated for 2022/2023 and 2023/2024 by Janet Watson, “INSOL International, Foundation Certificate in International Insolvency Law, Module 5B Guidance Text, British Virgin Islands, 2023/2024”, p 58 [↑](#footnote-ref-142)
143. BVI Business Companies Act, section 197A(3) [↑](#footnote-ref-143)
144. Charlotte Walker, text updated for 2022/2023 and 2023/2024 by Janet Watson, “INSOL International, Foundation Certificate in International Insolvency Law, Module 5B Guidance Text, British Virgin Islands, 2023/2024”, p 58 [↑](#footnote-ref-144)
145. BVI Business Companies Act, section 197A(3) [↑](#footnote-ref-145)
146. Ibid., section 197A(4) [↑](#footnote-ref-146)
147. Ibid., section 197A(5) [↑](#footnote-ref-147)
148. Ibid., section 197A(9) [↑](#footnote-ref-148)
149. Ogier, Insight, “Plans and schemes of arrangement in the British Virgin Islands”, <https://www.ogier.com/news-and-insights/insights/plans-and-schemes-of-arrangement-in-the-british-virgin-islands/>, published on 7 January 2022, accessed on 21 June 2024 [↑](#footnote-ref-149)
150. Ibid. [↑](#footnote-ref-150)
151. Carey Olsen, “Plans and schemes of arrangement in the British Virgin Islands”, <https://www.careyolsen.com/sites/default/files/CO_BVI_CORP_Plans%20and%20schemes%20of%20arrangement%20in%20the%20BVI_3.17_0.pdf>, published in March 2017, accessed on 21 June 2024 [↑](#footnote-ref-151)
152. Ogier, Insight, “Plans and schemes of arrangement in the British Virgin Islands”, <https://www.ogier.com/news-and-insights/insights/plans-and-schemes-of-arrangement-in-the-british-virgin-islands/>, published on 7 January 2022, accessed on 21 June 2024 [↑](#footnote-ref-152)
153. Carey Olsen, “Receiverships in the BVI”, <https://www.careyolsen.com/sites/default/files/CO_BVI_HK_SING_DRL_Receiverships-in-the-BVI_3_20%20%281%29.pdf>, published in March 2020, accessed on 21 June 2024 [↑](#footnote-ref-153)
154. Insolvency Act 2003, section 115(2)(b) [↑](#footnote-ref-154)
155. Ibid., section 115(2)(a) [↑](#footnote-ref-155)
156. Mourant, Guide, “The things a security taker needs to know about receivership under BVI law”, [https://www.mourant.com/2016-guides/the-things-a-security-taker-needs-to-know-about-receivership-under-bvi-law-(updated).pdf](https://www.mourant.com/2016-guides/the-things-a-security-taker-needs-to-know-about-receivership-under-bvi-law-%28updated%29.pdf), p 3, published in December 2016, accessed on 21 June 2024 [↑](#footnote-ref-156)
157. Insolvency Act 2003, section 118(1)(a) [↑](#footnote-ref-157)
158. Ibid., section 118(1)(b)(i) [↑](#footnote-ref-158)
159. Ibid., section 119(1) [↑](#footnote-ref-159)
160. Ibid., section 119(2)(c) [↑](#footnote-ref-160)
161. Ibid., section 139(5) [↑](#footnote-ref-161)
162. Ibid., section 127(1) [↑](#footnote-ref-162)
163. Ibid., section 127(1)(a) [↑](#footnote-ref-163)
164. Ibid., section 127(1)(b) [↑](#footnote-ref-164)
165. Ibid., section 127(2)(a) [↑](#footnote-ref-165)
166. Charlotte Walker, text updated for 2022/2023 and 2023/2024 by Janet Watson, “INSOL International, Foundation Certificate in International Insolvency Law, Module 5B Guidance Text, British Virgin Islands, 2023/2024”, p 54 [↑](#footnote-ref-166)
167. Insolvency Act 2003, section 128(1)(a) [↑](#footnote-ref-167)
168. Ibid., section 128(1)(b) [↑](#footnote-ref-168)
169. Ibid., section 128(2) [↑](#footnote-ref-169)
170. Ibid., section 129(1)(d) [↑](#footnote-ref-170)
171. Ibid., section 126(1) [↑](#footnote-ref-171)
172. David Sawtell, “The remedies of the mortgagee and appointing receivers” (2020) Butterworths Journal of International Banking and Financial Law 767-769, at 768 [↑](#footnote-ref-172)
173. Charlotte Walker, text updated for 2022/2023 and 2023/2024 by Janet Watson, “INSOL International, Foundation Certificate in International Insolvency Law, Module 5B Guidance Text, British Virgin Islands, 2023/2024”, p 54 [↑](#footnote-ref-173)
174. David Sawtell, “The remedies of the mortgagee and appointing receivers” (2020) Butterworths Journal of International Banking and Financial Law 767-769, at 768-769 [↑](#footnote-ref-174)
175. Section 175(2) of the Insolvency Act 2003 provides that liquidation does not affect the right of a secured creditor (Orange) to take possession and realise or otherwise deal with the asset (such as the Property) over which it has a security interest [↑](#footnote-ref-175)
176. Marcia McFarlane, Harneys, “Receivership: Draconian or now versatile?”, <https://www.harneys.com/insights/receivership-draconian-or-now-versatile/>, published on 19 May 2022, accessed on 21 June 2024 [↑](#footnote-ref-176)
177. Charlotte Walker, text updated for 2022/2023 and 2023/2024 by Janet Watson, “INSOL International, Foundation Certificate in International Insolvency Law, Module 5B Guidance Text, British Virgin Islands, 2023/2024”, p 11 [↑](#footnote-ref-177)
178. Ibid., p 5 [↑](#footnote-ref-178)
179. Insolvency Act 2003, section 155(2)(a) [↑](#footnote-ref-179)
180. Ibid., section 155(2)(b) [↑](#footnote-ref-180)
181. Ibid., section 155(2)(d) [↑](#footnote-ref-181)
182. Ibid., section 155(2)(e) [↑](#footnote-ref-182)
183. Ibid., section 155(3)(a) [↑](#footnote-ref-183)
184. Ibid., section 155(3)(b) [↑](#footnote-ref-184)
185. Ibid., section 155(2)(a) [↑](#footnote-ref-185)
186. Insolvency Rules, rule 149(1) [↑](#footnote-ref-186)
187. Insolvency Act 2003, section 8(1)(a) [↑](#footnote-ref-187)
188. Ibid., section 155(2)(e) [↑](#footnote-ref-188)
189. David Sawtell, “The remedies of the mortgagee and appointing receivers” (2020) Butterworths Journal of International Banking and Financial Law 767-769, at 768 [↑](#footnote-ref-189)
190. Insolvency Act 2003, section 8(1)(b) [↑](#footnote-ref-190)
191. Hope Wilson and Gurjeet Kaur Walia, Howes Percival, “Letter Before Action or Statutory Demand? … That is the question!”, <https://www.howespercival.com/articles/letter-before-action-or-statutory-demand-that-is-the-question/>, published on 3 November 2021, accessed on 21 June 2024 [↑](#footnote-ref-191)
192. Insolvency Act 2003, section 155(2)(a) [↑](#footnote-ref-192)
193. Insolvency Rules, rule 149(1) [↑](#footnote-ref-193)
194. Insolvency Act 2003, section 155(2)(e) [↑](#footnote-ref-194)
195. Ibid., section 8(1)(a) [↑](#footnote-ref-195)
196. Ibid., section 162(2)(b) [↑](#footnote-ref-196)
197. Ibid., section 162(1) [↑](#footnote-ref-197)
198. Ibid., section 162(1)(a) [↑](#footnote-ref-198)
199. Mourant, Guide, “What a creditor needs to know about liquidating an insolvent BVI company”, <https://www.mourant.com/file-library/media---2020/what-a-creditor-needs-to-know-about-liquidating-an-insolvent-bvi-company---oct-2020.pdf>, published in October 2020, accessed on 21 June 2024 [↑](#footnote-ref-199)
200. Insolvency Act 2003, section 8(1)(b) [↑](#footnote-ref-200)
201. Claire Goldstein, Christopher Pease and Mark Rowlands, Harneys, “Litigation: Enforcement of foreign judgments in the British Virgin Islands”, <https://www.lexology.com/library/detail.aspx?g=2ee81af2-af47-42ba-b6e0-36d4b082ecbd>, published on 24 January 2019, accessed on 21 June 2024 [↑](#footnote-ref-201)
202. Matthew Brown, Conyers, “Common Law Enforcement of a Foreign Judgment in the BVI: The Invest Bank Case”, <https://www.conyers.com/publications/view/common-law-enforcement-of-a-foreign-judgment-in-the-bvi-the-invest-bank-case/>, published in November 2023, accessed on 21 June 2024 [↑](#footnote-ref-202)
203. Charlotte Walker, text updated for 2022/2023 and 2023/2024 by Janet Watson, “INSOL International, Foundation Certificate in International Insolvency Law, Module 5B Guidance Text, British Virgin Islands, 2023/2024”, p 66 [↑](#footnote-ref-203)
204. Reciprocal Enforcement of Judgments Act 1922, section 2 [↑](#footnote-ref-204)
205. Ibid., section 3(1) [↑](#footnote-ref-205)
206. Ibid. [↑](#footnote-ref-206)
207. Ibid. [↑](#footnote-ref-207)
208. Eastern Caribbean Supreme Court Civil Procedure Rules 2023, Part 74.2(a) [↑](#footnote-ref-208)
209. Ibid., Part 74.2(d)(i)(B) [↑](#footnote-ref-209)
210. Ibid., Part 74.3 [↑](#footnote-ref-210)
211. Ibid., Part 74.5(1) [↑](#footnote-ref-211)
212. Ibid., Part 74.6(1) [↑](#footnote-ref-212)
213. Reciprocal Enforcement of Judgments Act 1922, section 3(3)(a) [↑](#footnote-ref-213)
214. Eastern Caribbean Supreme Court Civil Procedure Rules 2023, Part 45.2(e) [↑](#footnote-ref-214)
215. Fiona Kelleher, IBB Law, “What happens when a sole director and shareholder dies?”, <https://www.ibblaw.co.uk/insights/when-a-sole-director-and-shareholder-dies>, published on 18 March 2024, accessed on 21 June 2024 [↑](#footnote-ref-215)
216. Goughs Solicitors, What happens if a company’s sole director/shareholder dies?, <https://www.goughs.co.uk/news/what-happens-if-a-companys-sole-director-shareholder-dies/>, published on 30 March 2021, accessed on 21 June 2024 [↑](#footnote-ref-216)
217. Model articles for private companies limited by shares, model article 17(2) [↑](#footnote-ref-217)
218. Katherine Forster, Birketts LLP, “What happens on the death or incapacity of a sole director and shareholder?”, <https://www.birketts.co.uk/legal-update/what-happens-on-the-death-or-incapacity-of-a-sole-director-and-shareholder/>, published on 13 November 2023, accessed on 21 June 2024 [↑](#footnote-ref-218)
219. Fiona Kelleher, IBB Law, “What happens when a sole director and shareholder dies?”, <https://www.ibblaw.co.uk/insights/when-a-sole-director-and-shareholder-dies>, published on 18 March 2024, accessed on 21 June 2024 [↑](#footnote-ref-219)
220. UK Companies Act 2006, section 125 [↑](#footnote-ref-220)
221. EWHC 3872 (Ch) [↑](#footnote-ref-221)
222. Practical Law Corporate, “Rectification of register: registration of executor of deceased sole member and director without grant of probate (High Court)”, <https://uk.practicallaw.thomsonreuters.com/w-019-2785?contextData=(sc.Default)&transitionType=Default&firstPage=true>, published on 1 March 2019, accessed on 21 June 2024 [↑](#footnote-ref-222)
223. Loeb Smith, “The restoration of struck-off and dissolved companies in the British Virgin Islands: post January 2023”, <https://www.loebsmith.com/legal/the-restoration-of-struck-off-and-dissolved-companies-in-the-british-virgin-islands-post-january-2023/355/>, published on 15 February 2023, accessed on 21 June 2024 [↑](#footnote-ref-223)
224. Ibid. [↑](#footnote-ref-224)
225. BVI Business Companies (Amendment) Act 2022, section 213(3) [↑](#footnote-ref-225)
226. Loeb Smith, “Company Restorations in the BVI”, <https://www.loebsmith.com/legal/company-restorations-in-the-bvi/405/>, published on 11 June 2024, accessed on 21 June 2024 [↑](#footnote-ref-226)
227. BVI Business Companies (Amendment) Act 2022, section 218(1)(a) [↑](#footnote-ref-227)
228. Ibid., section 217(2)(a) and section 218(1)(b) [↑](#footnote-ref-228)
229. Ibid., section 217(3) and section 218(5) [↑](#footnote-ref-229)
230. Ibid., section 217(6) and section 218B(6) [↑](#footnote-ref-230)
231. Ibid., section 217(3) [↑](#footnote-ref-231)
232. Ibid., section 218(2)(b) [↑](#footnote-ref-232)
233. Ibid., section 218(2)(f) [↑](#footnote-ref-233)
234. Ibid., section 217(2)(d) and section 218(4) [↑](#footnote-ref-234)
235. Marcia McFarlane and Andrew Thorp, Harneys, “Appointment of receivers in the British Virgin Islands”, <https://www.lexology.com/library/detail.aspx?g=e3e3043a-2f2a-47b5-8ea9-a8dce798fd5e>, published on 28 April 2016, accessed on 21 June 2024 [↑](#footnote-ref-235)
236. BVIHC (COM) 0032 of 2018 [↑](#footnote-ref-236)
237. Ibid., paragraph 1 [↑](#footnote-ref-237)
238. Ibid., paragraph 17 [↑](#footnote-ref-238)
239. Ibid., paragraph 10 [↑](#footnote-ref-239)
240. Ibid., paragraph 11 [↑](#footnote-ref-240)
241. Eastern Caribbean Supreme Court Civil Procedure Rules 2023, Part 51.2(1) [↑](#footnote-ref-241)
242. Ibid., Part 51.2(2) [↑](#footnote-ref-242)
243. Carey Olsen, “Receiverships in the BVI”, <https://www.careyolsen.com/sites/default/files/CO_BVI_HK_SING_DRL_Receiverships-in-the-BVI_3_20%20%281%29.pdf>, published in March 2020, accessed on 21 June 2024 [↑](#footnote-ref-243)
244. *VTB Bank (Public Joint Stock Company) v Miccros Group Ltd and another* BVIHC (COM) 2018/0067 [↑](#footnote-ref-244)
245. BVIHC (COM) 2018/0067 [↑](#footnote-ref-245)
246. *VTB Bank (Public Joint Stock Company) v Miccros Group Ltd and another* BVIHC (COM) 2018/0067, paragraph 24 [↑](#footnote-ref-246)
247. Eastern Caribbean Supreme Court Civil Procedure Rules 2023, Part 51.3 [↑](#footnote-ref-247)
248. Mourant, Guide, “The things a security taker needs to know about receivership under BVI law”, [https://www.mourant.com/2016-guides/the-things-a-security-taker-needs-to-know-about-receivership-under-bvi-law-(updated).pdf](https://www.mourant.com/2016-guides/the-things-a-security-taker-needs-to-know-about-receivership-under-bvi-law-%28updated%29.pdf), p 4, published in December 2016, accessed on 21 June 2024 [↑](#footnote-ref-248)
249. Eastern Caribbean Supreme Court Civil Procedure Rules 2023, Part 51.4(1) [↑](#footnote-ref-249)
250. Ibid., Part 51.4(3) [↑](#footnote-ref-250)
251. Ibid., Part 51.4(4) [↑](#footnote-ref-251)