



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 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: **[studentnumber.assessment5B]**. An example would be something along the following lines: 202021IFU-314.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 “studentnumber” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **31 July 2021**. The assessment submission portal will close at **23:00 (11 pm) GMT on 31 July 2021**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **7 pages**.

ANSWER ALL THE QUESTIONS

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

Commented [CW1]: 10 marks

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

When is the appointment of a liquidator **deemed to commence**, when there has been a qualifying resolution passed to appoint a liquidator?

- (a) On the date of the order appointing the liquidator.
- (b) On the date the qualifying resolution is passed.**
- (c) On the filing of the application to appoint a liquidator.
- (d) On the advertisement of the application to appoint a liquidator.

Commented [CW2]: Correct 1 mark

Question 1.2

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

- (a) Within 14 days of the service of the statutory demand.
- (b) Within 21 days of the date of the statutory demand.
- (c) Within 21 days of the service of the statutory demand.**
- (d) Within 14 days of the date of the statutory demand.

Commented [CW3]: Correct 1 mark

Question 1.3

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

- (a) A member of the company.
- (b) A creditor.
- (c) The creditors' committee.
- (d) A receiver.**

Commented [CW4]: Correct 1 mark

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?**

- (a) The creditors, the shareholders, persons claiming an interest in the assets and the company.
- (b) The creditors, sureties, the shareholders and the company.
- (c) The creditors, sureties, persons claiming an interest in the assets of the company and the company.
- (d) The creditors, shareholders, sureties and persons claiming an interest in the assets of the company.

Commented [CW5]: Correct 1 mark

Question 1.5

A person is an "eligible insolvency practitioner", able to be appointed over an insolvent BVI company, foreign company or an individual's estate as a trustee in bankruptcy if:

- (a) He or she is a licenced insolvency practitioner; has given written consent to act; is not disqualified from holding a licence; is not disqualified from acting; and there is in force security for the proper performance of his or her functions.
- (b) He or she is a licenced insolvency practitioner; has advertised for his or her role; is not disqualified from holding a licence; is not disqualified from acting; and there is in force security for the proper performance of his or her functions.
- (c) He or she is a licenced insolvency practitioner; has given written consent to act; is not disqualified from holding an appointment; is not disqualified from acting; and there is in force security for the proper performance of his or her functions.
- (d) He or she is a licenced insolvency practitioner; has given written consent to act; is not disqualified from holding a licence; is not disqualified from acting; and there is in force an undertaking for the proper performance of his or her functions.

Commented [CW6]: Correct 1 mark

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?

- (a) Within 12 months of the date of judgment.
- (b) Within 3 months of the date of trial.
- (c) Within 6 months of the date of judgment.
- (d) Within 6 months of the date of trial.

Commented [CW7]: Correct 1 mark

Question 1.7

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

- (a) The liquidator has custody and control of the assets of the company.
- (b) The assets automatically vest in the liquidator.
- (c) The directors remain in office, but cease to have any powers.
- (d) Shares in the company cannot be transferred.

Commented [CW8]: Correct 1 mark

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?

- (a) Two (2) years prior to the onset of insolvency and ending on the appointment of the liquidator.
- (b) Two (2) years prior to the appointment of the liquidator.
- (c) Six (6) months prior to the onset of insolvency and ending on the appointment of the liquidator.
- (d) Five (5) years prior to the appointment of the liquidator.

Commented [CW9]: Correct 1 mark

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?

- (a) Stating that the company is insolvent or is likely to become insolvent.
- (b) Approving a written proposal setting out how the creditors' rights will be varied or cancelled.
- (c) Approving a liquidation plan and a declaration of solvency.
- (d) Nominating an eligible insolvency practitioner to be appointed interim supervisor.

Commented [CW10]: Correct 1 mark

Question 1.10

When does a voluntary liquidation commence?

- (a) When the directors of the company sign a declaration of solvency.
- (b) When the directors of the company sign a liquidation plan.
- (c) When the directors of the company pass the resolution appointing the voluntary liquidator.

(d) On the date the voluntary liquidator files a notice of appointment with the Registrar.

Commented [CW11]: Correct 1 mark

QUESTION 2 (direct questions) [10 marks]

Commented [CW12]: 10 marks

Question 2.1 [maximum 2 marks]

Commented [CW13]: Comprehensive answer, 2 marks

With reference to the relevant legislation, in what circumstances can a liquidator be removed from office?

Pursuant to section 187 (*Removal of liquidator*) of the Insolvency Act, a liquidator can be removed from office if:

- (a) the liquidator is not eligible to act as an insolvency practitioner in relation to the company;
- (b) the liquidator breaches any duty or obligation imposed on him/her by or owed by him/her under the Insolvency Act, the Insolvency Rules or the Regulations made under section 486 of the Insolvency Act, or in his/her capacity as liquidator under any other law of the Virgin Islands;
- (c) the liquidator fails to comply with any direction or order of the BVI Court made in relation to the liquidation of the company; or
- (d) the BVI Court is satisfied that:
 - (i) the liquidator's conduct of the liquidation is below the standard that may be expected of a reasonably competent liquidator;
 - (ii) the liquidator has interest(s) that conflict with his/her role as liquidator; or
 - (iii) for some other reason he/she should be removed as liquidator.

An application for the removal of a liquidator may be made by the creditors' committee, a creditor or member of the company, or the Official Receiver.

Question 2.2 [maximum 2 marks]

Commented [CW14]: Good answer 2 marks

A liquidator is appointed to a BVI incorporated company by the Court. In what circumstances would an officer of that company be deemed to have committed an offence pursuant to the fraudulent conduct provisions? You are required to make reference to the relevant legislation.

Pursuant to section 289(1) (*Fraudulent Conduct*) of the Insolvency Act, where a liquidator of a company is appointed by the BVI Court (under section 159 of the Insolvency Act), a person who is or has been an officer of the company is deemed to have committed an offence if, at any time whilst an officer or during the period of 12 months preceding the commencement of the liquidation, he/she has:

- (a) made or caused to be made any gift or transfer of, or charge on, or has caused, permitted or acquiesced in the levying of any execution against the company's assets; or
- (b) has concealed or removed any of the company's assets since, or within, 60 days of the date of any unsatisfied judgment or order for the payment of money obtained against the company.

Importantly, pursuant to section 289(2) of the Insolvency Act, an officer will not be guilty of an offence of fraudulent conduct under section 289:

- (a) by reason of conduct constituting an offence under section 289(1)(a) (i.e. in relation to a gift or transfer, etc.) which occurred more than 5 years before the commencement of the liquidation of the company; or

- (b) if he/she proves that, at the time of the conduct constituting the offence, he/she had no intent to defraud the company's creditors.

Question 2.3 [maximum 2 marks]

Commented [CW15]: Good answer, 2 marks

With reference to the Insolvency Act, what powers are provided to the BVI Court in relation to the orders the Court can make in support of foreign insolvency proceedings?

Part XIX (*Orders in aid of Foreign Proceedings*) of the Insolvency Act provides that, upon the application of a foreign representative (as defined in section 466(1) of the Insolvency Act) the BVI Court is provided with wide powers to grant for an order in aid of a foreign proceeding (as defined in section 466(1) of the Insolvency Act).

Pursuant to section 467(3) of the Insolvency Act, the BVI Court may, amongst other things: (a) restrain the commencement or continuation of any proceedings, execution or other legal process or the levying of any distress against a debtor or in relation to any of the debtor's property; (b) restrain the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property; (c) require any person to deliver up to the foreign representative any property of the debtor or the proceeds of such property; (d) 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; (e) appoint an interim receiver of any property of the debtor for such term and subject to such conditions as it considers appropriate; (f) authorise the examination by the foreign representative of the debtor or of any person who could be examined in a Virgin Islands insolvency proceeding in respect of a debtor; (g) stay or terminate or make any other order it considers appropriate in relation to a Virgin Islands insolvency proceeding; or (h) make such order or grant such other relief as it considers appropriate.

In determining the BVI Court's exercise of its powers under section 467, pursuant to section 468(1) of the Insolvency Act, the BVI Court is required to be guided by what will "*best ensure the economic and expeditious administration of the foreign proceeding*" to the extent consistent with (a) the just treatment of all persons claiming in the foreign proceeding; (b) 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; (c) the prevention of preferential or fraudulent dispositions of property subject to the foreign proceeding, or the proceeds of such property; (d) 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; and (e) comity.

Certain restrictions to the orders made by the BVI Court under section 467(3) do apply. In particular, pursuant to section 467(4) of the Insolvency Act, an order made by the BVI Court under section 467(3) shall not affect the right of a secured creditor to take possession of, realise or otherwise deal with the property of the debtor over which the secured creditor has a security interest; and pursuant to section 486(2) of the Insolvency Act, an order made by the BVI Court under section 467 shall not without the consent of the person concerned: (i) affect the right of such creditor to benefit from set-off; or (ii) result in a preferential creditor receiving less than he would receive in a Virgin Islands insolvency proceeding.

Question 2.4 [maximum 4 marks]

Commented [CW16]: Excellent answer, 4 marks

With reference to the relevant legislation, set out the circumstances in which a company will be considered insolvent in the BVI.

Section 8(1) of the Insolvency Act provides that a company is insolvent if:

- (a) it fails to comply with the requirements of a statutory demand;
- (b) execution or other process issued on a judgment, decree or order of a Virgin Islands court in favour of a creditor of the company is returned wholly or partly unsatisfied; or
- (c) either: (i) the value of the company's liabilities exceeds its assets; or (ii) the company is unable to pay its debts as they fall due.

Accordingly, a company will be considered 'insolvent' in the BVI in the following circumstances:

- (a) if a company fails to comply with the terms of a statutory demand (being demand in writing, dated and signed by the creditor requiring payment of a debt that is due and payable within 21 days of service of the demand, in the form prescribed under section 156 of the Insolvency Act) and such statutory demand is not successfully set aside under sections 156 and 157 of the Insolvency Act (e.g. on the grounds that the debt the subject of the statutory demand is disputed) (section 8(1)(a));
- (b) a company fails to satisfy (in whole or in part) execution or other process issued on a judgment, decree or other of the BVI Court in favour of a creditor of the company (section 8(1)(b));
- (c) it is proved to the satisfaction of the BVI Court that the value of the company's liabilities exceeds the value of its assets, or "balance sheet insolvency" (section 8(1)(c)(i)). Section 10 of the Insolvency Act defines liability broadly as "*a liability to pay money or money's worth including a liability under an enactment, a liability in contract, tort or bailment, a liability for a breach of trust and a liability arising out of an obligation to make restitution, and ... includes a debt*", which "*may be present or future, certain or contingent, fixed or liquidated, sounding only in damages or capable of being ascertained by fixed rules or as a matter of opinion*". For these purposes, a company will not be considered 'balance sheet insolvent' in circumstances where the value of a company's assets became lower than those of its liabilities for only a short period (see BVI Court of Appeal decision in *Trade and Commerce Bank v Island Point Properties*, SA BVICA 2009/0012); or
- (d) it is proved to the satisfaction of the BVI Court that a company is unable to pay its debts as they fall due (section 8(1)(c)(ii)). This is a question of fact. For these purposes, the inability of a company to pay a debt that is due and is not disputed is sufficient evidence of insolvency (see *Cornhill Insurance plc v Improvement Services Limited* [1986] 1 WLR 114).

Notwithstanding the above, on a Court appointment, the BVI Court has residual discretion as to whether it should find the company insolvent and appoint a liquidator.

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

Commented [CW17]: 15 marks

Question 3.1 [maximum 5 marks]

Commented [CW18]: Good answer, 5 marks

With reference to the relevant legislation, explain the steps a liquidator must take when preparing to terminate a liquidation.

Pursuant to Section 234(2) of the Insolvency Act, "as soon as practicable" after completing his/her duties in relation to the liquidation of the company (i.e. in preparation for the termination of the liquidation), the liquidator is required to prepare: (i) a final report, (ii) a statement of realisations and distributions in respect of the liquidation, and (iii) a summary of the grounds upon which a creditor or member may object to the striking of the company from the Register (being, pursuant to Section 234(1) of the Insolvency Act, the register of

international business companies, the register of companies under the Companies Act or the BVI Companies Act, in each case maintained by the Registrar).

Section 234(3) of the Insolvency Act sets out the requirements for certain statements to be included in the final report, as follows: (i) that all known assets of the company have been disclaimed, realised or distributed without realisation; (ii) that all proceeds of realisation have been distributed; and (iii) that there is no reason why, in the opinion of the liquidator, the company should not be struck from the Register, and dissolved.

Pursuant to Section 234(4) of the Insolvency Act, the liquidator is empowered to make an application to the BVI Court to exempt it (the liquidator) from compliance with the requirement to send the final report to all known creditors; or to modify the entire provision with regard to a final report (e.g. as to content).

Pursuant to Section 232(b) of the Insolvency Act, the liquidator will then file a certificate of compliance, confirming compliance with the requirements set out in Section 234(2) of the Insolvency Act (as modified pursuant to Section 234(4)), following which the liquidation of the company will terminate (if applicable).

Question 3.2 [maximum 5 marks]

In relation to a voluntary (solvent) liquidation, please set out: (i) the red flags that would lead a voluntary liquidator to identify the company as insolvent; and (ii) the steps that are required of the voluntary liquidator in the event insolvency is identified. Please ensure that you refer to the relevant legislation.

Voluntary liquidation under the BVI Business Companies Act, 2004 (the "BCA") is not available to insolvent companies – pursuant to Section 197 of the BCA, a company may only be liquidated under Part XII of the BCA if: (i) it has no liabilities; or (ii) it is able to pay its debts as they fall due and the value of its assets equals or exceeds its liabilities (i.e. the company is solvent).

The following may be potential 'red flags' that may lead a voluntary liquidator to identify the company as insolvent:

- (a) if the directors of the company refuse to make a declaration of solvency in the approved form stating that: (i) the company is and will continue to be able to discharge, pay or provide for its debts as they fall due, and (ii) the value of the company's assets equal or exceeds its liabilities, as required pursuant to Section 198(1) of the BCA;
- (b) if the directors of the company fail to approve a liquidation plan, as required pursuant to Section 198(1)(b)(ii) of the BCA; and/or
- (c) if an administrator or liquidator of the company has been appointed under the Insolvency Act (see Section 203(1)(A) of the BCA).

Pursuant to Section 209(1) of the BVI Business Companies Act, 2004 (the "BCA"), a company is insolvent if: (a) the value of its liabilities exceeds, or will exceed, its assets; or (b) it is, or will be, unable to pay its debts as they fall due.

Pursuant to Section 209, Division 2 of the BCA, if a voluntary liquidator discovers, during the course of their investigations that the company is insolvent, the voluntary liquidator is required to immediately send a written notice to the Official Receiver, and if the company is regulated by the Financial Services Commission, written notice to the Financial Services Commission.

Commented [CW19]: 5 marks,

Good answer, but please also see the comment below.

Commented [CW20]: Please note that the company could not be placed into voluntary liquidation in the event that items (a) to (c) had occurred.

Commented [CW21]: These are the red flags for the voluntary liquidator

Pursuant to Section 210(1) of the BCA, the voluntary liquidator must call a meeting of the creditors within 21 days of the date of the written notice to the Official Receiver. The meeting is treated as the first meeting of creditors of the company, called pursuant to Section 179 of the Insolvency Act, by a liquidator appointed by the members of a company.

From the time that the voluntary liquidator becomes aware that the company is or will be insolvent, the Insolvency Act applies. The BVI Court will appoint a liquidator if it is satisfied that the company is insolvent (see Section 211A of the BCA). In the event that the voluntary liquidator is not a licenced insolvency practitioner, the Official Receiver may apply to the Court for the appointment of himself or another licensed insolvency practitioner as liquidator.

Question 3.3 [maximum 5 marks]

Commented [CW22]: Comprehensive answer, 5 marks

Referring to legislation (where relevant), explain where a receiver, appointed over the assets of a BVI company, would find his or her powers.

Receivers are appointed either (i) by the BVI Court on an application; or (ii) under a debenture.

Pursuant to Section 127 of the Insolvency Act, a receiver has the powers expressly or impliedly conferred on him / her: (a) in the case of a receiver appointed by the BVI Court, by the Court Order under which he / she was appointed; and (b) in the case of a receiver appointed pursuant to a charge or other instrument (out of court), by the charge or other instrument by which he / she was appointed.

Additionally, Section 127(2) of the Insolvency Act sets out the statutory powers granted to a receiver in the event that the Court order or the charge or other instrument by which he / she was appointed does not expressly provide, as follows:

- (a) a receiver may demand and recover, by action or otherwise, income of the assets in respect of which he / she was appointed;
- (b) issue receipts for income recovered;
- (c) manage, insure, repair and maintain the assets in respect of which he / she was appointed; and
- (d) exercise, on behalf of the company, a right to inspect books or documents that relate to the assets in respect of which he / she was appointed in the possession or under the control of a person (other than the company).

Pursuant to Section 128 of the Insolvency Act, the primary duty of a receiver is to exercise his / her powers (a) in good faith and for a proper purpose; and (b) in a manner he / she believes, on reasonable grounds, to be in the best interests of the person in whose interests he / she was appointed; and to the extent consistent with this, the receiver must also have reasonable regard to the interests of: (a) the creditors of the company; (b) sureties of the company; (c) persons claiming, through the company, an interest in the assets in respect of which he / she was appointed; and (d) the company.

Where a receiver exercises a power of sale of the assets in respect of which he / she was appointed, that receiver owes a duty to obtain the best price reasonably obtainable at the time of sale (see Section 129(1) of the Insolvency Act). Such duty is owed to: (a) the creditors of the company; (b) sureties of the company; (c) persons claiming, through the company, an interest in the assets in respect of which he / she was appointed; and (d) the company.

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

Commented [CW23]: 12 marks

Question 4.1 [maximum 6 marks]

Commented [CW24]: 5 marks, good answer.

In September 2020 Harrison Holdings Limited, a company incorporated in England, brought a claim against Maximilian Properties Limited, a company incorporated in the BVI, in the English High Court. Maximilian Properties did not attend the hearing and Harrison Holdings was awarded judgment in the sum of USD 5,000,000.

There are other enforcement options that could have been considered under the IA

Maximilian Properties has significant assets in the BVI. Giving reasons, with particular reference to the Reciprocal Enforcement of Judgments Act 1922, what options should Harrison Holdings be advised to consider in order to enforce its foreign judgment debt?

Harrison Holdings may consider seeking the enforcement of the English High Court judgment pursuant to the Reciprocal Enforcement of Judgments Act (Cap 65) 1922 (the "1922 Act").

Once a foreign judgment is duly registered under the 1922 Act by the BVI Court, it is treated (from the date of registration) as being of the same force and effect as if the judgment had been made in the BVI, and all the remedies usually available under the CPR will be available (see Section 3(3) of the 1922 Act, and CPR 45.2), which would allow Harrison Holdings to seek enforcement against the 'significant' assets of Maximilian Properties in the BVI.

For the purposes of considering whether Harrison Holdings will be able to seek to register the English High Court judgment pursuant to the 1922 Act, the following considerations are relevant:

- (a) the English High Court judgment (pursuant to which US\$5,000,000 is payable) falls within the scope of the definition of "judgment" under the 1922 Act – as a final and conclusive judgment for a monetary sum - which is defined as "any judgment or order given or made by a Court in any civil proceedings, whether before or after the passing of [the 1922 Act], whereby any sum of money is made payable..." (see Section 2(1) of the 1922 Act);
- (b) the English High Court judgment falls within the territorial scope of enforcement under the 1922 Act (see Section 3(1) of the 1922 Act);
- (c) the English High Court judgment must be registered within 12 months of the date on which the judgment was made or such further period as the BVI Court may allow (see Section 3(1) of the 1922 Act) – in this regard, Harrison Holdings has until September 2021 in order to make an application to register the English Court judgment;
- (d) there is a risk that the BVI Court will not order the English High Court judgment to be registered if any of the exceptions set out in Section 3(2) of the 1922 Act apply. Based on the fact pattern outlined above, the following two exceptions may apply:
 - (i) Maximilian Properties (as judgment debtor), did not carry on business and was not ordinarily resident within the jurisdiction of the English High Court, and did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the English High Court; and / or
 - (ii) Maximilian Properties (as judgment debtor) is able to satisfy the BVI Court that an appeal is pending or that it is entitled to and intends to appeal.

In this regard, it would appear that Maximilian Properties did not submit to the jurisdiction of the English High Court, as it did not engage in the proceedings. However, it is not clear whether it does (or does not) carry on business in England and Wales such that it does not fall within the scope of the exception at Section 3(2)(b) of the 1922 Act). It is also not clear from the fact pattern above, whether an

appeal is ongoing or if Maximillian Properties will seek to appeal the English High Court judgment. Accordingly, further facts will need to be provided prior to confirmation of the availability of registration.

As a matter of BVI common law, the BVI Court will treat a final and conclusive monetary judgment as a cause of action in itself under the doctrine of obligations by actions, irrespective of the jurisdiction in which the judgment was obtained – the English High Court judgment will fall within the scope of this doctrine (being a judgment for the payment of US\$5,000,000 by Maximillian Properties). Harrison Holdings will need to prove that the English High Court judgment is final and conclusive monetary judgment for a specified sum (which it is), and if so proved, a retrial of the issues will not be necessary and Harrison Holdings may apply for summary judgment pursuant to CPR, rule 50.

Question 4.2 [maximum 9 marks]

Peralta Limited, a company incorporated in England, and Santiago Limited, a company incorporated in the BVI, entered into a loan agreement for the purchase of a property on Moskito Island in the BVI. Under the terms of the loan agreement, Peralta transferred USD 10,000,000 to Santiago and Santiago successfully purchased the property. Subsequently, Santiago failed to make any of the loan repayments pursuant to the repayment clauses. As a result of this failure, Peralta made a demand for immediate repayment in full, as it was entitled to do under the agreement. Santiago failed to make any repayments in full or in part.

Providing reasons, with particular reference to the Insolvency Act, what options should Peralta Limited be advised to consider in order to enforce the debt owed to it by Santiago Limited?

Peralta Limited should consider serving a statutory demand on Santiago Limited – this is a written demand for payment of the debt that is due and payable by Santiago Limited to Peralta Limited under the terms of the loan agreement, in the amount of US\$10,000,000 plus any interest accruing pursuant to the terms of the loan agreement, in the format required under Section 156 of the Insolvency Act. The statutory demand must be, amongst other things, in writing, dated and signed by Peralta Limited and must require Santiago Limited to pay the debt (or to secure or compound the debt, as applicable) to the reasonable satisfaction of Peralta Limited within 21 days of service of the statutory demand.

Provided that Santiago Limited does not seek to set aside the statutory demand under Sections 156 of 157 of the Insolvency Act – by way of application within 14 days of the service of the statutory demand, for example on the basis that the debt is disputed – and in the event that Santiago Limited fails to comply with the terms of the statutory demand (i.e. fails to pay the debt in full), Peralta Limited may seek to commence formal insolvency proceedings in respect of Santiago Limited.

Peralta Limited may use the threat of commencement of liquidation proceedings as a powerful tool / leverage against Santiago Limited, with a view to obtaining repayment in full of the outstanding debt due and payable pursuant to the loan agreement.

Peralta Limited may seek to commence liquidation and the appointment of liquidator(s) on the basis that Santiago Limited is insolvent. Pursuant to Section 162 of the Insolvency Act, Peralta Limited, in its capacity as creditor of Santiago Limited, may make an application for the appointment of a liquidator.

Commented [CW25]: 7 marks, good answer, well done.

Candidate should have also considered, among other things, an application for the appointment of a receiver, given that the asset is a property.

Such application may be made on the basis that Santiago Limited is insolvent (see Section 159(1) of the Insolvency Act) - Peralta Limited will be under an obligation to prove to the satisfaction of the BVI Court that Santiago Limited is unable to pay its debts as they fall due (which is a question of fact) (see Section 8 of the Insolvency Act). Santiago Limited will be deemed to be insolvent in the event that it has failed to comply with the terms of the statutory demand (referred to above) served by Peralta Limited on Santiago Limited, in the prescribed form.

To the extent Peralta Limited has any concerns that there will be risk of dissipation of Santiago Limited's assets (including the property on Moskito Island) prior to the appointment of liquidator(s), Peralta Limited may make an application under Section 170 of the Insolvency Act for interim relief – namely the appointment of a provisional liquidator. It would be necessary for Peralta Limited to prove to the satisfaction of the Court that the appointment of a provisional liquidator was necessary for the purposes of maintaining the value of assets owned or managed by Santiago Limited and is in the public interest.

If Peralta Limited is successful in its application for the appointment of liquidator(s), from the date of the Court order appointing liquidators, Santiago Limited will be in liquidation and the liquidator(s) will have custody and control of its assets (see Section 175(1) of the Insolvency Act). The liquidator(s) will, amongst other things, collect in the assets of the company and distribute the proceeds in accordance with the Insolvency Act – including Peralta Limited, as unsecured creditor. Peralta Limited will need to make a claim against Santiago Limited by submitting to the liquidator(s) a written claim, signed on its behalf (see Rule 184 of the Insolvency Rules). The liquidator may need Peralta Limited to provide further information in support of the claim – including, a verifying affidavit; or other documentary evidence. Peralta Limited will then be paid in accordance with the waterfall (see Section 207 of the Insolvency Act).

It is not clear from the fact pattern above, whether Santiago Limited granted security over its interests in the property on Moskito Island to Peralta Limited and/or to any other party. The appointment of a liquidator(s) will not affect the rights of any security holder to enforce its security. To the extent Peralta Limited has been granted any security it may seek to enforce its security, by way of payment of the debt. To the extent any portion of the debt remains unpaid following enforcement, it may claim against Santiago Limited for the balance of the unpaid debt.

*** End of Assessment ***

Commented [CW26]: Total marks: 47