



**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]: Good answer, 2 marks

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

Pursuant to Section 187(1) of the Insolvency Act, 2003 ("**Insolvency Act**"), the Court may remove a liquidator of a company from office if it is satisfied that one of the following circumstances applies:

- (a) the liquidator is not eligible to act as an insolvency practitioner;
- (b) the liquidator breaches any duty or obligation imposed on him or her, including (*inter alia*) under the Insolvency Act, the Insolvency Rules, 2005 (the "**Rules**") or in his capacity as liquidator;
- (c) the liquidator failed to comply with any direction or order of the Court made in relation to the liquidation of the company; or
- (d) the 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 an interest that conflicts with his or her role as liquidator; or
  - (iii) that for some other reason he or she should be removed.

**Question 2.2 [maximum 2 marks]**

Commented [CW14]: 2 marks, comprehensive answer

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.

Where a liquidator of a BVI company is appointed, a person who is or has been an officer of the company is deemed to have committed an offence pursuant to Section 289(1) of the Insolvency Act if, at any time whilst an officer or during the period of 12 months preceding the commencement of the liquidation, he or 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 sine, or within 60 days of the date of any unsatisfied judgment or order for the payment of money obtained against the company.*"

However, a person is not guilty of an offence under this section by reason of conduct which occurred more than 5 years before the liquidation commenced or if it is proved that he or she had no intention to defraud creditors (Section 289(2) of the Insolvency Act).

**Question 2.3 [maximum 2 marks]**

Commented [CW15]: 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?

Pursuant to Section 467(3) of the Insolvency Act, the BVI Court may in aid of foreign insolvency proceedings exercise powers to:

- (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) *subject to subsection (4), 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) *authorize 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."*

Pursuant to Section 467(4), any order shall not affect the right of a secured creditor to take possession of and realise his security. The matters to be considered by the BVI Court in determining an application under Section 467 are set out in Section 468.

**Question 2.4 [maximum 4 marks]**

Commented [CW16]: 4 marks, good answer

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 sets out the meaning of insolvency. Pursuant to that provision, a BVI company or a foreign company is insolvent if one or more of the following are satisfied:

- (a) the company fails to comply with the requirements of a statutory demand (i.e. the company has failed to pay, secure or compound the debt in the statutory demand within 21 days of being served) and that statutory demand has not been set aside under Section 157 (see Section 8(1)(a) of the Insolvency Act).
- (b) execution or other process issued on a judgment, decree or order of a BVI court in favour of a creditor of the company is returned wholly or partly unsatisfied (see Section 8(1)(b) of the Insolvency Act).
- (c) the value of the company's liabilities exceeds its assets (namely, balance sheet insolvency) (see Section 8(1)(c)(i) of the Insolvency Act). For this purpose, the

meaning of liability is widely defined in Section 10(1) 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 "liability" includes a debt". Moreover, Section 10(2) makes it clear that a liability 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." However, where a company's assets become lower than its liabilities for only a short period of time, the company will not necessarily be found to be balance sheet insolvent (see *Trade and Commerce Bank v Island Point Properties*, SA BVICA 2009/0012).

- (d) the company is unable to pay its debts as they fall due (see Section 8(1)(c)(ii) of the Insolvency Act). In *Cornhill Insurance Plc v Improvement Services Limited* [1986] 1 WLR 114, the English Court held that where a company was under an undisputed obligation to pay a specific sum and failed so to do, it could be inferred that it was unable to do so.

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

Commented [CW17]: 13 marks

#### Question 3.1 [maximum 5 marks]

Commented [CW18]: Very comprehensive answer, 5 marks

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

A liquidation may be terminated in accordance with Section 232 of the Insolvency Act, which provides that the liquidation of a company terminates on the first occurring of:

*"(a) the making by the Court of an order terminating the liquidation under section 233, or such later date as may be specified in the order;*

*(b) the filing by the liquidator of a certificate of compliance with the provisions of section 234(2), as modified by the Court under section 234(4), if appropriate; or*

*(c) the making by the Court of an order under section 234(4) exempting the liquidator from compliance with 234(2), or such later date as may be specified in the order."*

If the liquidation is terminated by the making by the Court of an order terminating the liquidation on the ground that it is "just and equitable to do so" (Section 233(1)), the Court may require the liquidator to file a report in respect to any matters relevant to the application before making any such order (Section 233(3) of the Insolvency Act). The liquidator would also need to comply with any terms and conditions or supplemental directions imposed by the Court in connection with the termination of the liquidation (Section 233(4) of the Insolvency Act). After such an order is made, the person who applied for the order (which includes a liquidator) must file a sealed copy of the order with the Registrar within 10 days (see Sections 233(2) and (6) of the Insolvency Act).

In the event that the liquidation is terminated as a result of the liquidator having completed his or her duties, the liquidator is required to as soon as practicable after completing those duties:

*"(a) prepare and send to every creditor of the company whose claim has been admitted and to every member of the company –*

*(i) his or her final report...and a statement of realisations and distributions in respect of the liquidation...; and*



(ii) a summary of the grounds upon which a creditor or member may object to the striking of the company from the Register; and

(b) file with the Registrar a copy of the final report and the statement of realisations and distributions sent to the creditors and members of the company" (see Section 234(2) of the Insolvency Act).

The final report must contain the statements set out in Section 234(3) of the Insolvency Act, namely:

"(a) that all known assets of the company have been disclaimed, realised or distributed without realisation;  
(b) that all proceeds of realisation have been distributed; and  
(c) that there is no reason why, in his or her opinion, the company should not be struck from the Register, and dissolved."

However, as outlined above, the Court may exempt the liquidator from compliance with Section 234(2)(a) above or otherwise modify the application of the provisions (Section 234(4) of the Insolvency Act).

A liquidator may also apply to the Court for his or her release of all liability in respect of any act or default of his or her administration of the company pursuant to Section 235 of the Insolvency Act.

Finally, Section 236 of the Insolvency Act provides that the Insolvency Rules shall "provide for the dissolution of a company on the termination and completion of the liquidation of the company". However, no such provision in the Rules exists and, in practice, a liquidator will write to the Registrar to request the dissolution of the company.

### Question 3.2 [maximum 5 marks]

Commented [CW19]: 3 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.

Potential red flags that would lead a voluntary liquidator to identify the company as insolvent

A voluntary liquidator is required to file a declaration of solvency made by the directors within 14 days of his or her appointment (Section 204 of the BVI Business Companies Act). Accordingly, any reluctance by the directors of the company to make a fully compliant declaration of solvency (together with a sufficiently detailed statement of the company's assets and liabilities) in accordance with Section 198 of the BVI Business Companies Act could be a warning for any proposed voluntary liquidator that the company may be insolvent.

Commented [CW20]: Please see section 203(1) – a voluntary liquidator cannot be appointed unless a declaration of solvency has been signed.

Whilst it is only necessary to appoint an "eligible individual" under Section 199(2) of the BVI Business Companies Act, reluctance by the directors to appoint a licenced insolvency practitioner could potentially indicate that the directors wish to avoid the affairs of the company being examined in any detail.

Commented [CW21]: Whilst this may not necessarily be untrue, voluntary liquidations in the BVI are regularly conducted by persons that are not licenced insolvency practitioners, often by the trust companies (registered agents).

Other red flags could include a voluntary liquidator discovering upon examining the company's records that there is increased borrowing by the company, an inability of the company to obtain finance and/or an unwillingness by directors to provide personal guarantees, delays paying creditors or a failure to make payments at all, demands from

creditors for payment and/or incomplete or inaccurate financial records or poor working capital.

**Commented [CW22]:** Please also see section 209(1) of the BCA (as is referred to below).

Steps that are required of the voluntary liquidator in the event insolvency is identified

Pursuant to Section 209(2), Division 2 of the BVI Business Companies Act, if at any time the voluntary liquidator of a company is of the opinion that the company is insolvent, he or she is required forthwith to send written notice in the approved form to the Official Receiver and, if the company is a regulated person, to the Commission. For the purposes of Division 2, Section 209(1) provides that 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.

If a voluntary liquidator sends such a notice to the Official Receiver, such voluntary liquidator is required pursuant to Section 210(1), Division 2 of the BVI Business Companies Act to call a meeting of creditors of the company to be held within 21 days of the date of the notice. Such a meeting will be treated as the first meeting of creditors of the company under Section 179 of the Insolvency Act.

**Commented [CW23]:** There is some further details that could have been included here, including: (i) reference to the voluntary liquidator and whether they are a licensed insolvency practitioner; and (ii) the general application of the Insolvency Act; and (iii) reference to the application of section 182 of the Insolvency Act, 2003.

**Question 3.3 [maximum 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.

**Commented [CW24]:** 5 marks, good answer

Pursuant to Section 127(1) of the Insolvency Act, a receiver has the powers expressly or impliedly conferred on him or her –

*"(a) in the case of a receiver appointed out of court, by the charge or other instrument by which he or she was appointed; or*

*(b) in the case of a receiver appointed by the Court, by the Court order under which he or she was appointed."*

Unless the charge or other instrument under which, or Court order by which, he or she was appointed expressly provides otherwise, a receiver may exercise the following statutory powers in Section 127(2) of the Insolvency Act:

*"(a) demand and recover, by action or otherwise, income of the assets in respect for which he or she was appointed;*

*(b) issue receipts for income recovered;*

*(c) manage, insure, repair and maintain the assets in respect of which he or 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 or she was appointed in the possession or under the control of a person other than the company."*

The primary duty of a receiver pursuant to Section 128(1) of the Insolvency Act is to exercise his or her powers: (a) in good faith and for a proper purpose; and (b) in a manner he or she believes, on reasonable grounds, to be in the best interests of the person in who interests he or she was appointed. To the extent consistent with such duty, a receiver shall exercise his or her powers with reasonable regard to the interests of: (a) the company's creditors; (b)

sureties who may be called upon to fulfil obligations of the company; (c) persons claiming, through the company, an interest in assets in respect of which he or she was appointed; and (d) the company (see Section 128(2) of the Insolvency Act).

A receiver who exercises a power of sale of assets in respect of which he or she was appointed also owes a duty to (a) creditors of the company; (b) sureties who may be called upon to fulfil obligations of the company; (c) persons claiming, through the company, an interest in assets in respect of which he or she was appointed; and (d) the company, to obtain the best price reasonably obtainable at the time of sale (Section 129(1) of the Insolvency Act).

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

Commented [CW25]: 11 marks

**Question 4.1 [maximum 6 marks]**

Commented [CW26]: 4 marks

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.

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?

A foreign judgment may be registered in the BVI pursuant to the Reciprocal Enforcement of Judgments Act 1922 (the "1922 Act"). Where a foreign judgment is registered under the 1922 Act, it will from the date of such registration be of the same force and effect as if it had been made in the BVI (Section 3(3)(a) of the 1922 Act). Upon registration, a judgment creditor can pursue the usual remedies available in the BVI, including (but not limited to) obtaining a charging order, orders for the seizure and sale of goods and the appointment of a receiver (see CPR 45.2).

Pursuant to Section 3 of the 1922 Act, where a judgment has been obtained in the High Court in England, a judgment creditor may apply to the BVI High Court (CPR Part 72) at any time within twelve months after the date of the judgment or such longer period as may be allowed by the Court to have that judgment registered in the BVI. Given that the English judgment was granted against Maximilian Properties Ltd ("MPL") in September 2020, an application would fall within the 12 month time period without any application to the Court for an extension of this time period. In support of such an application, Harrison Holdings Limited ("HHL") will need to obtain an authenticated copy of the English judgment.

A judgment is defined in Section 2(1) of the 1922 Act as: "...any judgment or order given or made by a Court in any civil proceedings, whether before or after the passing of this Act, whereby any sum of money is made payable..." The English judgment against MPL was for payment of a sum of money (namely, the payment of US\$ 5,000,000) and, therefore, would satisfy this definition.

However, no judgment shall be ordered to be registered in the BVI if any of the following matters set out in Section 3(2) of the 1922 Act apply:

"(a) the original Court acted without jurisdiction; or

*(b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original Court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that Court;*

*(c) the judgment debtor being the defendant in the proceedings, was not duly served with the process of the original Court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that Court or agreed to submit to the jurisdiction of that Court; or*

*(d) the judgment was obtained by fraud; or*

*(e) the judgment debtor satisfies the High Court either that an appeal is pending, or that he is entitled and intends to appeal, against the judgment; or*

*(f) the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the High Court."*

We are not aware that subsections (a) or (d)-(f) apply in this case. However, we are aware that MPL did not attend the hearing and, accordingly, further information is required from HHL to ensure that sub-sections (b) and (c) above are not applicable. In particular, for the purposes of sub-section (b) above, HHL should confirm whether MPL carried on any business in England. If not, HHL should be asked to confirm whether MPL filed an acknowledgement of service and/or a defence in response to HHL's claim or otherwise took such steps in the English proceedings in order to submit to the jurisdiction. In the event that MPL did not submit to the jurisdiction of the English Courts, then HHL would be unable to seek recognition of its judgment in the BVI.

There is no information to suggest that MPL was not duly served with the English claim for the purposes of sub-section (c) above. However, HHL should confirm that MPL was duly served with proceedings and obtained any necessary permission from the English High Court to serve MPL out of the jurisdiction.

In the event that any of the matters in Section 3(2) of the 1922 Act are likely to apply so as to prevent enforcement of the English judgment debt, it would still remain open to HHL to commence formal insolvency proceedings against MPL in the BVI. Pursuant to Section 446(1) of the Insolvency Act, foreign creditors have the same rights regarding the commencement of, and participation in, BVI insolvency proceedings as creditors in the BVI.

**Commented [CW27]:** More detail could have been provided here.

**Commented [CW28]:** Candidate has failed to refer to the common law in relation to the judgment

#### **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.

**Commented [CW29]:** 7 marks, good answer.

Part of the answer is a little confused, particularly in relation to the application to appoint a liquidator.

In addition it is not clear whether the candidate would advise Peralta to make an application to appoint a receiver in the BVI Court.

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?

### Rights as a secured creditor

It is unclear from the facts set out above whether Santiago Limited ("**Santiago**") created a charge over its property in favour of Peralta Limited ("**Peralta**") (and, in particular, over the property on Moskito Island) in writing in accordance with Section 161(1) of the BVI Business Companies Act, 2004.

It is important to obtain further information as to whether Peralta holds any security in respect of the debt, the type of such security and the terms of any such security. For example, an equitable charge provides the lender with the power to sell the assets subject to the charge. On the other hand, the holder of a legal mortgage may be entitled to remedies to foreclose or sell the secured assets or to appoint a receiver over the secured asset. If a charge has been created over immovable property in the BVI in favour of Peralta, then this ought to have been registered with the Land Registry in the BVI. In the event that Peralta is able to take steps to realise any such security, then this is very likely to be Peralta's best option to enforce its debt.

Secured creditors are able to enforce their claim directly against the asset secured and their rights are unaffected by the liquidation of the company (Section 175(2) of the Insolvency Act).

However, it should be noted that it would remain open to Peralta as a secured creditor pursuant to Section 211(1) of the Insolvency Act to do the following in the event of Santiago's liquidation (discussed in further detail below):

- (a) "value the assets subject to the security interest and claim in the liquidation of a company as an unsecured creditor for the balance of his or her debt; or
- (b) Surrender his or her security interest to the liquidator for the general benefit of creditors and claim in the liquidation as an unsecured creditor for the whole of his or her debt, but he or she is not obliged to do either"

In particular, Option (a) above may prove to be useful to Peralta in the event that any security proves to be insufficient for the purposes of discharging the debt in full under the loan agreement.

### Receivership

Peralta may also be able to appoint a receiver out of court or pursuant to the terms of its loan agreement. Peralta is advised to check whether the loan agreement includes any power to appoint a receiver out of court. If such a power is provided in the instrument, then such a receiver (other than an administrative receiver) is deemed to be an agent of the company (unless otherwise stated in the instrument) (Section 126 of the Insolvency Act).

- (a) The powers conferred on a receiver appointed out of court will be those expressly or impliedly conferred on him or her by the instrument by which he or she was appointed (Section 127(1)(a) of the Insolvency Act).
- (b) A receiver may also be appointed by the Court by an application. In that case, the powers of the receiver will be those specified in the Court order appointing the receiver (Section 127(1)(b) of the Insolvency Act). A receiver appointed by the Court will be an agent of the company.

Sections 118 and 119 of the Insolvency Act set out various requirements pertaining to notice of the appointment of the receiver. Section 139 contains additional provisions relating to the formal requirements for the appointment of receivers out of court.

**Commented [CW30]:** Correct, there is no mention of security in the question.

**Commented [CW31]:** It is unclear from this section whether the candidate would advise Peralta to consider an application to the Court to appoint a receiver. Indeed the answer suggests that the candidate would only consider the appointment of a receiver where this is set out in the loan agreement.

As set out above in relation to Question 3.3 above, Sections 127-129 of the Insolvency Act set out a number of statutory powers and duties of receivers. Specifically, in the case of Peralta, it is noted that a receiver who exercises a power of sale of assets in respect of which he or she was appointed owes a duty to (a) creditors of the company; (b) sureties who may be called upon to fulfil obligations of the company; (c) persons claiming, through the company, an interest in assets in respect of which he or she was appointed; and (d) the company, to obtain the best price reasonably obtainable at the time of sale (Section 129(1) of the Insolvency Act).

#### Formal Insolvency Proceedings

If Peralta is an unsecured creditor, then it may commence formal insolvency proceedings against Santiago in the BVI. Pursuant to Section 159(1)(a) of the Insolvency Act, the Court may appoint a liquidator of a BVI company on an application under Section 162 of the Insolvency Act.

A creditor of the company may make an application under Section 162 of the Insolvency Act to appoint a liquidator if, *inter alia*, the company is insolvent (see Section 162(1)(a) and (2)(b) of the Insolvency Act). The commencement of insolvency proceedings remains open to a foreign creditor (such as Peralta) under Section 446 of the Insolvency Act.

In the BVI, a company will be considered to be insolvent if one of the following requirements set out in Section 8(1) of the Insolvency Act are satisfied:

- (a) a company fails to comply with the requirements of a statutory demand that has not been set aside under section 157 (Section 8(1)(a) of the Insolvency Act);
- (b) execution or other process issued on a judgment, decree or order of a BVI court in favour of a creditor of the company is returned wholly or partly unsatisfied (Section 8(1)(b) of the Insolvency Act).
- (c) either: (i) the value of the company's liabilities exceed its assets; or (ii) the company is unable to pay its debt as they fall due (Section 8(1)(c) of the Insolvency Act).

At present, Peralta has not served a formal statutory demand on Santiago in the format specified in Section 156 of the Insolvency Act requiring payment within 21 days of service of the statutory demand. In addition, Peralta has not yet sought an order from the BVI Court in its favour in relation to the debt for the purposes of Section 8(1)(b) of the Insolvency Act. Whilst these options remains open to Peralta, as outlined below, Peralta may be able to establish that Santiago's insolvency by a much more straightforward method (namely, that Santiago is unable to pay its debts as they fall under Section 8(1)(c)(ii) of the Insolvency Act).

The question of whether Santiago is unable to pay its debts as they fall due is a question of fact. In *Cornhill Insurance Plc. v Improvement Services Ltd and Others* [1986] 1 W.L.R. 114, the English Court held that that where a company was under an undisputed obligation to pay a specific sum and failed to do so, it could be inferred that it was unable to do so (per Harman J, at 118B–D, G–H). Accordingly, the failure of Santiago to repay the loan (which does not appear, at least at this stage, to be disputed by Santiago) could suffice to establish Santiago's insolvency.

At this juncture, it is noted that there is currently insufficient information in order to be able to comment on whether Santiago's liabilities exceed its assets (i.e. balance sheet insolvency) for the purposes of satisfying Section 8(1)(c)(i) of the Insolvency Act. However, the definition

**Commented [CW32]:** Correct

**Commented [CW33]:** Please note proving insolvency is precisely Peralta would need to do under an application to appoint a liquidator under section 162(1)(a). It is therefore unclear what the candidate means by this sentence.

If Peralta serves a statutory demand and this is not paid or set aside, then Santiago would be "deemed" insolvent under section 8(1)(a) of the IA. i.e. this is arguable a more straightforward route.

of "liability" for this purpose is widely defined in Section 10 of the Insolvency and includes "*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*" (Section 10(2) of the Insolvency Act). However, the test may not be satisfied if the company is merely balance sheet insolvency for a short period of time (see *Trade and Commerce Bank v Island Point Properties*, SA BVICA 2009/0012).

The liquidation of the company commences from the date of the Court order appointing the liquidator (Section 160 of the Insolvency Act). The primary statutory duties of a liquidator are set out in Section 185(1) of the Insolvency Act, which include (*inter alia*) taking possession of, protecting and realising the assets of the company for distribution to unsecured creditors on a *pari passu* basis. Santiago would be able to make an admissible claim in the liquidation (as defined in Section 11 of the Insolvency Act), which would need to set out the requirements specified in Rule 184 of the Insolvency Rules.

In the event that an urgent need arises to preserve Santiago's assets, Peralta may make an application to the Court under Section 170 of the Insolvency Act for the appointment of a provisional liquidator. Such an application must be made after an application for the appointment of a liquidator has been filed but before it has been determined.

**\* End of Assessment \***

**Commented [CW34]:** Total marks: 44