



**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]: 2 marks

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

Pursuant to section 187 of the Insolvency Act, a liquidator can be removed from office in the following circumstances:

1. If the liquidator is not eligible to act.
2. If the liquidator breaches a duty or obligation, fails to comply with a direction of the court, or if the court is satisfied that:
  - a. the liquidator's conduct in the liquidation is below the standard that may be expected of a reasonably competent liquidator.
  - b. The liquidator has interests in conflict with his/her role.

**Question 2.2 [maximum 2 marks]**

Commented [CW14]: 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.

In circumstances where a liquidator is court-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 (being the fraudulent conduct provisions), if at any time whilst an officer or in the 12-month period preceding the commencement of the liquidation, that person has:

- a. Made or caused to be made any gift, or transfer of, or exchange 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 sixty days of the date of any unsatisfied judgement or order for the payment of money obtained against the company.

**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?

Part XIX of the Insolvency Act provides for the main source of the BVI Court's powers to make orders in support of foreign insolvency proceedings. These powers allow the BVI court to grant recognition to a foreign proceeding and to provide assistance and relief to the foreign representative administering the foreign proceeding. More specifically, the BVI Court has the power to order as follows:

1. That the commencement or continuation of any proceedings against a debtor or a debtor's property be restrained, discontinued or not enforced.

2. That the creation, existence or enforcement of any right or remedy against any of the debtor's property be restrained.
3. That any person be required to deliver up any property of the debtor or the proceeds of such property.
4. The ordering or granting of relief which will facilitate or implement arrangements for the coordination between the BVI insolvency proceeding and a foreign proceeding.
5. That an interim receiver be appointed of any property of the debtor or such term and subject to such conditions as the court deems appropriate.
6. The examination by the foreign representative of the debtor or of any person who could be examined in a BVI insolvency proceeding.
7. Staying, terminating or making any other order it considers appropriate in the BVI insolvency proceeding.

**Question 2.4 [maximum 4 marks]**

**Commented [CW16]:** Good answer, 4 marks

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

Part VIII of the Insolvency Act governs the insolvency of a company, or 'corporate insolvency' and important definitions are also set out under section 8. Whilst a statutory test exists for determining insolvency, on a court appointment, the Court retains a discretion as to whether it finds a company to be insolvent or not.

The BVI Court would find a company insolvent in the following circumstances:

1. If it is proved to the satisfaction of the courts that a company is unable to pay its debts when they fall due which is a question of fact.
2. If it is proved to the satisfaction of the court that the value of the company's liabilities exceeds the value of its assets. This is also known as "balance sheet" insolvency. Section 10(1) of the Insolvency Act provides a wide definition for the term "liability" and includes a liability under any enactment, contract, tort, bailment or a breach of trust and arising out of an obligation to make restitution. Section 10(2) also states that a liability may be present or future, certain or contingent, fixed or liquidated. Although these definitions recognise an insolvency in a broad range of situations, the BVI Court of Appeal has held<sup>1</sup> that a company may not be considered balance sheet insolvent in circumstances where the value of the assets only became lower than the liabilities for a short period of time.
3. Where a company fails to satisfy (wholly or partially) execution or any other process issued on judgement, decree or order of the BVI Court in favour of a creditor of the company.
4. If a company fails to comply with the terms of a statutory demand (being a written demand for payment by a creditor in accordance with section 156 and it is not successfully set aside pursuant to ss. 156 and 157 of the Insolvency Act. In order to be effective however, the statutory demand must have been prepared correctly, and must require the company to pay the debt or to secure the debt in some way, to the reasonable satisfaction of the creditor. A company may apply to have the statutory demand set aside if the debt claimed is disputed and must make an application to the court to do so within 14 days of the original application.

<sup>1</sup> Trade and Commerce Bank v Island Point Properties SA BVICA 2009/0012

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

Commented [CW17]: 10 marks

**Question 3.1 [maximum 5 marks]**

Commented [CW18]: 3 marks

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

To bring a liquidation to an end, the liquidator takes steps to terminate the procedure pursuant to the provisions set out in section 232 of the Insolvency Act. A liquidation of the Company then terminates on the date of one of the following (whichever occurs first):

- 1) The Court makes an order terminating the liquidation.  
or
- 2) The liquidator files a certificate of compliance, as he is required to do under section 234(2) of the Insolvency Act.  
or
- 3) The Court makes an order exempting the liquidator from having to file a certificate of compliance.

In preparing to terminate the liquidation, the liquidator is required under section 234(2) to prepare a 'final report' as soon as practicable after completing his duties. There are certain statements which must be included in the final report, as set out at section 234(3) of the Insolvency Act. The report must then be sent to every admitted creditor and every member of the company, and then a copy of the report must be filed with the Registrar. The liquidator is also able to make an application to the Court to exempt the liquidator from the requirement to send the report to all known creditors or modify the entire provision with regard to the final report (s. 234(4)).

Commented [CW19]: More details could be included here.

Commented [CW20]: Missing a step.

Pursuant to section 235, the liquidator (or provisional liquidator) can apply to the Court for their release when their appointment ends. The release is important because it discharges the liquidator from all liability in respect to any act or default in relation to his administration of the company. Notwithstanding a release under section 235, the court is still able to make an order under section 254 against a liquidator.

Where a liquidation is completed and terminated once the liquidator has filed his final report and been released (as described above), the liquidator will then write to the Registrar / FSC to request that the company be dissolved. Whilst this is normally what happens, the termination of the liquidation does not necessarily always mean that the company should be dissolved. For example, in limited circumstances, it may be the case that the liquidation is terminated because the debt has been paid to the appointing creditor (i.e. through capital being injected by another interested party) which then allows for the liquidation to be terminated and the business to continue to operate.

**Question 3.2 [maximum 5 marks]**

Commented [CW21]: 4 marks, good answer

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.



Insolvency is not a requirement for a company to be liquidated, and it is often the case that a business will reach a natural end and need to be dissolved. That said, the liquidation of a company may start out as a (solvent) voluntary liquidation but upon further investigations by the liquidator it may be discovered that the company is actually insolvent. If this occurs, there is then a separate procedure set out in the Business Companies Act (BCA) to deal with such a circumstance.

- (i) Under the BCA section 197(1) a company can only be liquidated under Part XII if (a) it has no liabilities or (b) it is able to pay its debts as they fall due and the value of the assets is equal to or exceeds its liabilities, in other words, if it is solvent. Accordingly, as soon as the liquidator realises that the company is unable to meet its outstanding financial obligations in this manner, then these are 'red flags' which would lead a liquidator into recognising the company may be insolvent and therefore, unable to be liquidated pursuant to the BCA.

Furthermore, if upon investigation of the company's affairs, it becomes apparent that the company has failed to satisfy wholly or partially execution or other process issued on a judgement, decree or other order of the BVI court, in favour of a creditor of the company, then this may also be a 'red flag'. Similarly, the company's failure to comply with a statutory demand then this would also be a red flag under BVI insolvency law.

Where these 'red flags' exist, demonstrating that the company is insolvent, then the steps with the voluntary liquidator must take are as follows:

- (ii) Pursuant to section 209, Division 2 of the BCA, should a voluntary liquidator discover, during the course of their investigations that (a) the value of the company's liabilities exceeds or will exceed those of its assets, or (b) the company is or will be unable to pay its debts as they fall due, the voluntary liquidator is required to immediately send a written notice to the Official Receiver.

In the event that the company is regulated by the Financial Services Commission then a notice must also be provided to the Regulator.

The Liquidator must then call a meeting of the creditors within 21 days of the date of the [notice](#). The meeting is treated as the first meeting of the creditors of the company, called under section 179 of the Insolvency Act, by a liquidator appointed by the members of a company.

**Commented [CW22]:** Candidate should refer to section 210 of the BVI Business Companies Act, 2004

Because in a voluntary liquidation the liquidator does not necessarily have to be a licenced insolvency practitioner, in the event that the voluntary liquidation develops into an insolvent liquidation and the liquidator is not licenced, the official receiver may apply to the Court for the appointment himself or for the appointment of another licenced insolvency liquidator. From the point that the liquidator become aware that the company is insolvent, then the Insolvency Act will govern the liquidation.

### Question 3.3 [maximum 5 marks]

**Commented [CW23]:** 3 marks

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

The Insolvency Act and the IR (Insolvency Rules, 2005) govern a receivership, in addition to the BCA and the Conveyancing and Law of Property Act 1961 and a receiver is appointed either by way of a) a court application or b) under a debenture.

Section 116(1) of the Insolvency Act lists a number of persons who are not eligible to be appointed as a receiver and in practice, when a receiver is appointed via a Court application, that person is normally a registered insolvency practitioner. Joint receivers may also be appointed pursuant to section 117(1) of the Insolvency Act.

Once appointed, a receiver's powers are those expressly or impliedly set out in the charge or other instrument by which the receiver was appointed (section 127 (1)(a)), for example, a court appointed receiver's powers will be set out in the court order which appointed them. For this reason, the initial drafting of the appointing document or the order is critical as it establishes the extent of the receiver's powers. Further, section 127(2) of the Insolvency Act sets out the statutory powers of the receiver in the event that the appointment document is deficient.

The Insolvency Act also governs the administrative receiverships and under BVI Law, an administrative receiver can be appointed pursuant to a floating charge over all or substantially all of the company's assets or can be Court appointed.

As with a receiver, An administrative receiver's powers are found in the debenture or the other instrument which appointed him, and in addition, further powers are set forth in Schedule 1 of the Insolvency Act. As there are wide powers which are often provided to an administrative receiver the Insolvency Act imposes a number of requirements and duties on the administrative receiver.

Notwithstanding any provision set forth in the memorandum or articles, an administrative receiver may (unless the debenture or other instrument appointing him states otherwise):

- Execute all documents necessary or incidental to the exercise of his powers in the name of and on behalf of the company in receivership, and
- Use the company's seal.

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

##### Question 4.1 [maximum 6 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?

The recognition of foreign judgements in the BVI Court is principally governed by the Reciprocal Enforcement of Judgements Act (Cap 65) 1992 (the "1922 Act") and common law. Accordingly, in order to enforce its judgement against the Maximilian Properties Limited (MPL) BVI assets, Harrison Holdings Limited (HHL) could seek to do so by way of this Act. HHL can also consider whether it will be possible to enforce its judgement either by way of the Insolvency Act, or through Common Law, given it appears to be a monetary judgement.

Commented [CW24]: Not relevant in response to this question.

Commented [CW25]: This is slightly confused. A receiver can be appointed under a document such as a debenture (section 127(1)(a) or pursuant to an order of the BVI Court (section 127(1)(b)).

Commented [CW26]: More detail should be provided here.

Commented [CW27]: Not relevant here, as the question only asks about receivers.

Commented [CW28]: 13 marks

Commented [CW29]: 5 marks, good answer

The candidate might also have considered whether there are any other options available, for example under the IA.

This Act will be particularly useful for HHL because once a foreign judgement is 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 that judgement had been made in by the BVI Court. The effect of this is that all of the remedies available under the CPR will become available to HHL for the purposes of enforcement against the BVI assets. For example, and pursuant to CPR 45.2 these include, the ability to obtain i) a charging order, ii) a garnishee order, iii) a judgement of summons, iv) an order for seizure and the sale of goods, and v) the appointment of a receiver.

As a starting point, the enforcement of a foreign judgement in the BVI is only effective to the extent that the judgement debtor / defendant has assets in the BVI against which the judgement is actually enforceable. Accordingly, prior to making an application for registration or otherwise, it is important to identify any assets, such as shares, which are held in the jurisdiction. We are told that MPL has significant assets in the BVI, accordingly, it does appear that it may be worthwhile for HHL to seek to have the judgement enforced against the MPL BVI assets. We are not told exactly what the assets are, so as a starting point HHL should undertake further investigations to determine exactly what the assets are.

Once HHL is clear as to the extent of MPL's assets in the BVI (i.e. shares, property, cash), it could seek to have the English Court's judgement enforced in the BVI by way of the 1922 Act.

In order for the English judgement to be effective under the 1922 Act, as a starting point, that decision needs to satisfy the definition of 'judgement', which is defined as 'any judgement or order given or made by a court in any civil proceedings whether before or after the passing of the Act, whereby any sum of money is payable'. Therefore, only judgements for final and conclusive monetary sums can be enforced. Any other judgement, whether declaratory, injunctive or otherwise, cannot be enforced by the Act. As the judgement against MPL is for a monetary amount it would appear that it meets this requirement of the Act.

A further requirement for the 1922 Act to apply is that the judgement must have been given in the High Court of England Wales and Northern Islands, and the Court of Session in Scotland for the legislation to be applicable. There are also a number of other jurisdictions where it can be applied, however, for the purpose HHL, the judgement was issued by an English Court, accordingly, it will satisfy this requirement of the Act.

HHL should be advised that a foreign judgement is only registerable under the 1922 Act within 12 months of the date of the judgement, unless the BVI Court grants a longer period of time on the basis that it is 'just and convenient' to do so (s. 3(1) of the Act). As the judgement was obtained in September 2020, time will now be of the essence for HHL and it should not delay in seeking to identify the nature of the assets held in the BVI and taking steps to have the English judgement registered.

In order to register the judgement, HHL will need to apply to the BVI Court under CPR Part 72. The application must contain certain prescribed information and must exhibit a duly authenticated copy of the judgement and record any interest that has become due pursuant to English law (being the Country where the judgement was entered). The application can be made without notice to MPL which is a significant advantage for HHL, however, the Court may also order that HHL give security for costs in relation to any proceedings that may be brought by MPL to set aside the registration.

One point that HHL should be aware of in seeking to register its judgment by way of the 1922 Act, is that pursuant to section 3(2) of the Act the Court will not order a judgement to be registered in the event that the judgement debtor, was not duly served with the process of

the original court (the English Court) and did not appear, notwithstanding that he is ordinarily resident or carrying on a business within the jurisdiction of that court or agreed to submit to the jurisdiction of the court. Accordingly, because MPL did not appear at the English Court hearing, it will be important for HHL to demonstrate to the BVI Court that MPL were in fact duly served and properly put on notice of the English proceeding and hearing. It would be useful for HHL to provide more information surrounding the English litigation and in particular, whether MPL were properly served in respect to that claim and subsequent hearing.

Whilst based on the facts, the 1922 Act will likely provide a suitable route by which HHL can seek to have its judgement enforced against the MPL assets in the BVI, HHL should also be advised that it does not necessarily have to apply to register the foreign judgement by way of this Act in order to enforce the debt. There are also other ways in which the judgement can be enforced pursuant to the Insolvency Act and at common law.

Because the judgement against MPL is a monetary foreign judgement of a specified amount, at common law, the BVI Court will treat any final and conclusive monetary judgement as a cause of action in itself under the 'doctrine of obligation by action'. This is regardless of the jurisdiction where the judgement was obtained. In order to enforce the judgement via this route, HHL must prove the judgement before the BVI court and must show that it is i) a final and conclusive monetary judgement and ii) for a specified sum. If those matters are established a retrial of the issues in the action is not necessary and HHL can apply for summary judgement before the BVI Court by way of CPR Rule 50. Given the time constraints under the 1922 Act and the fact that MPL did not attend the English Court hearing, enforcing the judgement at common law and seeking summary judgement from the BVI Court may be a more straight forward route for HHL to consider.

Whilst based on the facts provided, we are not clear whether MPL is currently in liquidation or not, if that is the case however, then it is likely that there will be a moratorium in place in relation to MPL and its assets. If this is the case, HHL will need to consider the provisions under the insolvency Act and will need to submit a proof of debt claim in respect to its judgement to the MPL Liquidators. Section 446 of the Insolvency Act provides foreign creditors with a right of direct access and such creditors have the same rights regarding the commencement of and participation in a BVI insolvency proceeding as creditors from within the jurisdiction. In a corporate insolvency, the BVI Insolvency Act provides for a range of transactional avoidance provisions which are enforced by application to the BVI court. Such provisions are intended to give effect to the Pari Passu Principle, including the avoidance of preferential payments to creditors and transactions at an undervalue. Accordingly, If MPL is in liquidation, HHL will be treated fairly and alongside any other creditors.

**Question 4.2 [maximum 9 marks]**

**Commented [CW30]:** 8 marks, excellent answer, well done

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 Mosquito 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?

In a BVI corporate insolvency, the creditors are the main stakeholders and much of the legislation is heavily biased in favour of the creditors. For the reason, the BVI is considered 'a creditor-friendly' jurisdiction. One example of this is that in an insolvent liquidation the creditors can form a creditors committee which works with and can have influence over the decisions of the liquidator.

Section 446 of the Insolvency Act provides foreign creditors with a right of direct access and such creditors have the same rights regarding commencement of and participation in, a BVI insolvency proceeding as creditors from within the jurisdiction. In a corporate insolvency, the Insolvency Act provides for a range of procedures that may assist Peralta, and further there are also potential solutions found by way of the BCA insolvency is to be avoided.

#### **A Statutory Demand.**

The first option open to Peralta is to issue a statutory demand. A statutory demand is a written demand for payment of a debt that is due and payable, which is made by a creditor (in this case Peralta) in the format required under Section 156 of the Insolvency Act.

Peralta will need to instruct local BVI Counsel to make the application, however, the key requirements of a statutory demand are as follows:

- It must be in writing,
- dated, and
- Signed by Peralta (being the creditor).

It then must require Santiago to pay the debt or to secure or compound the debt to the reasonable satisfaction of the Peralta within 21 days of service of the statutory demand. If the debt is disputed, then Santiago can apply to set aside the statutory demand, however, in order to do so, Santiago must make an application to the court within 14 days of the date of the statutory demand being made, which is a narrow timeframe. Santiago would then have to establish that the debt is in fact not owed and it does not need to pay anything at this time. Given the facts provided, it is highly unlikely that Santiago would be successful in having the statutory demand set aside in circumstances where the terms of the loan agreement allow Peralta to demand immediate payment of the loan in full.

If Santiago fails to comply with the terms of the statutory demand, or fails to set it aside within the 14 day timeframe (pursuant to sections 156 and 157 of the Insolvency Act), then this can be used as evidence to demonstrate to the court that the company is insolvent and that a liquidator should be appointed to liquidate the company.

It should be noted however, that even if Santiago fails to meet the terms of the statutory demand, or set it aside, the Court may still hear opposition to an application made by Peralta to have a liquidator appointed. The test that the BVI Court will apply to determine where the dispute of a debt is genuine, is set out in the case of *Sparkasse Bregenz bank v Associated Capital Corporation*<sup>2</sup>.

The advantage of first seeking to make a statutory demand against Santiago is that this application is less arduous than skipping right to the actual liquidation of Santiago and is a good interim measure to flush out whether the company is actually capable of paying the debt or not. It may also provide leverage to force Santiago to enter into discussions about settlement of the debt if it does not want to risk the company being liquidated. If the company is actually insolvent however, and is in fact unable to pay its debts as they fall due (as the

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<sup>2</sup> Civil Appeal No. 10 of 2002.

facts suggest) then the next or alternative option for Peralta to consider is to have a liquidator appointed and Santiago liquidated in order to recover its loan.

### Liquidation:

If Peralta issued the statutory demand and Santiago fails to comply, then as noted above, Peralta could seek to have the company liquidated. As Peralta has already sought repayment under the loan agreement and made a further demand for payment in full, which Santiago has failed to pay, this evidence demonstrates that SL is unable to pay its debts as they have fallen due, which would mean that the company may be considered 'insolvent' pursuant to section 8 of the Insolvency Act. Accordingly, the next option open to PL is to seek to have Santiago liquidated in order to recover the loan.

There are two types of liquidations under BVI law, a voluntary liquidation, or an involuntary liquidation. The latter process will apply here as Peralta (as a creditor) will be applying to the BVI Court to have a liquidator appointed in order to commence the insolvency. It is common within the BVI, as an international financial centre for a foreign creditor to commence formal insolvency proceedings against a BVI company who has failed to pay its debts, however, if the Company is trading whilst insolvent (which is not completely clear on the facts) then there is a legal obligation on the directors to commence a liquidation. A failure to do so can cause the directors to become personally liable to the shareholders and creditors under the insolvent trading provisions under the Insolvency Act. This is certainly something that should be investigated further, and it would be helpful to know what financial state the company was in when it entered into the loan agreement and received the loan funds from Peralta.

Insolvency of a company is dealt with under Part VIII of the Insolvency Act and some procedural requirements are set out in the Insolvency Rules, 2005 (IR).

Firstly, an application would be made to the BVI Court to appoint a liquidator. At this point, the Court retains a residual discretion as to whether the company is to be found insolvent. As Peralta would be arguing that Santiago is insolvent because it is unable to pay its debts, this is a question of fact. The English case of *Cornhill Insurance Plc v Improvement Services Limited*<sup>3</sup> would have application here. In that decision, the Court held that an inability to pay a debt that is due and not disputed, is sufficient evidence of insolvency.

The BVI Court may appoint a liquidator over a BVI company pursuant to an application made under section 162 of the Insolvency Act and the liquidation of Santiago would actually commence at the point that the Court accepts Peralta's application and orders the appointment of the liquidator. As Peralta is a creditor of the company, it is able to make such an application pursuant to the primary provisions under section 162. Pursuant to section 159 (1) the Court can only appoint a liquidator if, among other options, the company is insolvent. Accordingly, the evidential onus will be on Peralta (as the applicant) and its counsel to provide evidence to the Court to demonstrate that Santiago has been unable to meet its debts as they have fallen due (as discussed above).

One of the benefits of filing an application for the appointment of a liquidator is that under section 170 of the Insolvency Act, the Court may appoint an eligible practitioner as a provisional liquidator. This provision is normally exercised where there is an urgent need to preserve the company's assets or business operations and to prevent a dissipation of assets between the time that the application is made and actually then ruled upon by the Court. Whilst we will need more facts to establish that there is in fact a risk of a dissipation of assets and that there is good arguable case for the appointment of a provisional liquidator, if

<sup>3</sup> [1986] 1 WLR 114

**Commented [CW31]:** Insolvent liquidation

**Commented [CW32]:** The candidate has not set out which subsection of 162 of the IA would be applicable to the application (which is fundamental).

this were to be the case, then this step could be beneficial for Peralta and any other creditors in terms of ensuring that any funds are preserved for settling debts owed to them.

Once (and if) a liquidator is appointed by the Court, then the effect of the liquidation is that no further actions or proceedings can be commenced against Santiago and no further remedies can be exercised over the company's assets. It will then be for Peralta, along with any other creditors, to submit their claims in respect to monies owed, to the Liquidator for further investigation / consideration. The extent of the terms of the loan agreement between Santiago and Peralta will determine how Peralta's claim will be dealt with. Whilst Peralta is not a preferential creditor pursuant to Schedule 2 of the IR, if the terms of the loan agreement included a charge in favour of Peralta over the property or the loan was secured against the property purchased by Santiago in some way (making Peralta's interest a secured interest), then it may be able to enforce that outside of the Liquidation. We would need more facts about the loan agreement in respect to this, but if that is in fact the case, then Peralta will not necessarily need to liquidate the company in order to recover the funds owed.

If it is the case that the loan agreement did not legal secure Peralta's interest to the property (asset) in anyway, then Peralta will be an unsecured creditor whose claim will be dealt with behind the claims of preferential creditors, the costs and expenses of the liquidation. Within each class of claim, claims are treated *pari passu* which means that all of the unsecured creditors' claims will be treated at the same rate, or on an equal basis. If Peralta is in fact an unsecured creditor, this is often a disadvantage because it will mean that other claims ahead of Peralta, and secured claims ultimately use up all of the Santiago's remaining funds before the unsecured creditors are dealt with.

Accordingly, prior to embarking on an application to liquidate the company, consideration should be given as to Peralta's position amongst any other known creditors and importantly, whether the terms of the loan agreement mean that Peralta is in fact a secured creditor who can immediately enforce its interest by way of the security against the property.

### **Receivership**

A further option for Peralta to consider is whether, instead of seeking to liquidate the company, it seek to place it in receivership by applying to the BVI Court to appoint a receiver for the purposes of then seeking to recover the loaned funds or to sell the property purchased by way of the loan in order to recover the amount owed. The Insolvency Act and the IR govern receiverships, which is a way to prevent the dissipation of assets of the company, whilst also undertaking asset tracing and further investigations into the financial position of the company, whilst the company continues to operate. A receivership is a mechanism that is often used by secured creditors in order to enforce its security against other assets of the company, but it could also be used by an unsecured creditor. Importantly, the applicant, in this case being Peralta must have a good arguable case in respect to the underlying claim being that it is owed repayment of the loaned funds pursuant to the loan agreement. Peralta must also be able to establish before the court, that there is a real risk of the dissipation of assets which would then prevent repayment of the debt it is owed. This must be demonstrated with evidence before the court.

Peralta would first apply to the Court for a receiver to be appointed (who is normally a qualified insolvency practitioner) and then if the Court was satisfied of the points as briefly set out above, once a receiver is appointed, there are a number of administrative steps which must be undertaken as prescribed as section 118 of the Insolvency act. The Santiago must also take steps as set out at section 119.

The powers of the receiver will be expressly set out in the order which appointed the receiver (s 127(1)(a)), accordingly it is crucial that this document is correctly drafted before it is presented to the Court. The Insolvency Act at section 127(2) also sets out minimum or standard powers of a receiver in the event that the order does not expressly deal with those powers.

Once appointed, the receiver's primary duty is to act in good faith and in the best interests of the person in whose interests he was appointed (i.e. Peralta's). The receiver must also have reasonable regard to the creditors of the company, the company itself, persons claiming an interest in the assets of the company and sureties who may be called upon to fulfil obligations of the company.

In circumstances where it is unclear on the facts whether Santiago does in fact have the ability to repay the loan, and where it is not clear whether the property that was purchased was actually purchased in Santiago's name, it may be beneficial to Peralta for a receiver to first be appointed in order to undertake further investigations into the financial position of Santiago and to determine whether the funds can be recovered from existing assets of the company. Particularly if Peralta is an unsecured creditor, it may maximise its recoveries more by way of a receivership than through a liquidation where it will be further down the preference list.

#### **Scheme of Arrangement:**

A further consideration that Peralta could seek to pursue with Santiago is a scheme of arrangement which (depending on the true financial status of Santiago) may allow the company to avoid insolvency and a liquidation. A scheme of arrangement is governed by the BCA and is a statutory mechanism that permits a company to enter into a compromise or arrangement between the company and its creditors (or its shareholders). Accordingly, it is a company restructuring mechanism which may avoid an insolvency.

A scheme of arrangement can be initiated by the company itself, a creditor, a shareholder, or a liquidator, accordingly, Peralta has the authority under the Act to initiate such a process, by way of an application to the BVI court for a meeting of the creditors (s. 179A (1)-(2) of the BCA). Usefully, and for the purposes of Peralta who may not necessarily know if Santiago is actually insolvent (or is just refusing to meet the loan repayments), there is no requirement that the company be insolvent when the application is made to the court.

If the court approves the application, a meeting will then be called, and the scheme will be put to a vote. The scheme will be approved if seventy-five percent in value of the creditors or class of creditors present and voting at the meeting agree to the scheme. If the requisite approval is given, the scheme is then put before the court for final approval. The scheme is only binding on the company, creditors and shareholders once the order is approved by the Court and filed with the Registrar (section 179A(5) BCA).

Pursuing a scheme of arrangement will only be useful for Peralta if it is not a secured creditor, so further information will need to be confirmed about the nature of the loan agreement and whether it has a secured interest against the property that Santiago purchased with the loaned funds. If the interest is not secured, and Peralta is an unsecured creditor, then if there is evidence to demonstrate that Santiago does actually have some funds that could be reallocated to Peralta (and other creditors) by way of a scheme, then it may be a better solution than a liquidation. Of course, the other challenge that Peralta may have is identifying other creditors who may be owed funds (or not) and seeking to get agreement/ support in respect to a scheme from the creditors. Further investigations would need to be made into this before this option was fully pursued as it can be an expensive



process. As a final point here, Peralta should note that in relation to a BVI scheme of arrangement:

- There is no provision for the rights of dissenters.
- There are no requirements for supervision of a scheme once the court order is granted (so if the Santiago refuses to comply it can be liable for a USD 5,000 fine but this would need to be obtained by a further Court application).
- There is no express protection for the rights of secured and preferential creditors.

**\* End of Assessment \***

**Commented [CW33]:** Total marks: 43