



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: **[studentID.assessment5B]**. An example would be something along the following lines: 202122-336.assessment5B. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **31 July 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. 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 [JW1]: 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.

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.

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.**

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.

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.

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.

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.

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.

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.

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.**

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Set out the circumstances in which a voluntary liquidator can be appointed over a company, pursuant to Part XII of the Business Companies Act 2004.

Pursuant to Part XII of the Business Companies Act 2004 ("BCA"), the circumstances with which a voluntary liquidator can be appointed over include where a company is no longer required by a business so that the company's assets may be dealt with, and its liabilities settled in order for the company to be dissolved.

A company is not required to be insolvent to be liquidated under Part XII of the BCA, nor is this available to insolvent companies.

Under the BCA, specifically Part XII, Section 197(1), a company can only be liquidated if either there are no liabilities, or if there are sufficient assets to pay its liabilities as they fall due, and the assets equal or exceed its liabilities.

Liquidation may still commence notwithstanding a security interest being registered with the BVI Registrar of Companies ("Registrar").

Commented [JW2]: ½ mark- Section 199 (1) & (2) (subject to section 200) of the BCA 2004 set out the circumstances in which a voluntary liquidator

Question 2.2 [maximum 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.

Where a liquidator is appointed to a BVI incorporated company by the Court, an officer of the company may be deemed to have committed an offence pursuant to the fraudulent conduct provision if at any time while being an officer or during the period of 12 months preceding the commencement of the liquidation, he has:

- a) Made or caused to be made any gifts or transfer, charge on, or has caused or permitted or acquiesced in the levying of the execution against the assets of the company; or
- b) Has concealed or removed any of its assets since, or within sixty days of the date of any unsatisfied judgement or order for payment of monies obtained against the company

This provision is captured under Part XI, Division 4, Section 289 of the BVI Insolvency Act, 2003 (the "Act").

Commented [JW3]: 1.5 marks - exceptions under subsection (2) not included

Question 2.3 [maximum 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?

The powers provided to the BVI Court in relation to the orders that the Court can make in support of foreign insolvency proceedings are captured under Part XIX of the Act.

Commented [JW4]: 0 marks - no mention of section 467 IA 2003 that list the 8 powers given to the Court

Under this Part, the Court can recognize certain foreign insolvency proceedings and provide assistance to foreign representatives.

However, these powers are only extended to certain designated countries which include Australia, Canada, Hong Kong, Japan, Jersey, New Zealand, United Kingdom and the USA.

Under this Part, the Court can apply applicable laws of the BVI or of the applicable country.

Question 2.4 [maximum 4 marks]

Commented [JW5]: 4 marks

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

Under Section 8(1) of the Act, a company is considered insolvent if it meets one of three criteria:

- a) It has failed to comply with the requirements of a statutory demand which was not set aside under Section 157 of the Act; or
- b) The execution of or other process issued on a judgement, decree or an order of the Court of the Virgin Islands is made in favour of a creditor of the company which is returned wholly or partly unsatisfied; or
- c) Either:
 - a. The value of the liabilities of the company exceeds its assets; or
 - b. The company is unable to pay its debts as they fall due

Furthermore, under Section 10(1) of the Act, a liability is defined as the obligation 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 it includes debt.

A liability may be present or future, certain or contingent, fixed or liquidated. It may be sounding only in damages or capable of being ascertained by fixed rules or as a matter of opinion. Finally, a liability must be legal and enforceable.

For the purposes of item a) above, a statutory demand is a written demand for payment of a debt that is due and payable and is made by a creditor in the format required under Section 156 of the Act. It must be in writing, dated and signed by the creditor. It must also require that the company pay the debt or secure or compound for the debt to the reasonable satisfaction of the creditor within 21 days of service.

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

Question 3.1 [maximum 5 marks]

Commented [JW6]: 3 marks - no mention of section 207A -208 BCA 2004 for voluntary liquidation

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

The steps taken to terminate a liquidation is captured under Section 232 of the Act.

Under this section, the liquidation is terminated on the occurrence of the first of:

- 1) The making of a Court order terminating the liquidation under Section 233, or a later date specified in the Order; or

- 2) The filing by the liquidator of a certificate of compliance with the provisions of section 234(2), or as modified by the Court under Section 234(4), if appropriate; or
- 3) The making of an Order by the Court under Section 234(4), exempting the liquidator from compliance with Section 234(2), or such later date as specified in the Order.

Under Section 233, an application to the Court for termination may be made by the liquidator, creditor, member, or the Official Receiver, at any time, if it is just and equitable to do so.

However, prior to making an Order under this section, the Court may require the liquidator to file a report with respect to any matters relevant to the application. On making an Order, the Court may give supplemental directions it considers fit in connection with the termination.

If the liquidator is the one to initiate the termination of the liquidation, prior to termination, and under Section 234(2) of the Act as noted above, the liquidator is required to prepare a final report which must be sent to every admitted creditor and every member of the Company. The report must also be filed with the Registrar.

The final report is required to contain a statement that all known assets of the company has been disclaimed, realized or distributed without realization; that all proceeds of realization have been distributed; and that there is no reason why, in his opinion, the company should not be struck from the Registrar, and dissolved.

Furthermore, the liquidator can apply under Section 235 of the Act to be released when their appointment ends. This release discharges the liquidator from all liability in respect of any act or default in relation to his administration of the Company.

It should be noted however, that termination of the liquidation does not necessarily mean that the Company is dissolved. Examples of this includes a situation where the debt is paid to the petitioning creditor and an application is made to terminate the liquidation so that the business can continue.

Question 3.2 [maximum 5 marks]

Commented [JW7]: 5 marks

Is it possible to make an application to the BVI Court for the appointment of an overseas insolvency practitioner in relation to a BVI company and, if so: (i) in what circumstances might a creditor consider the appointment of an overseas insolvency practitioner; and (ii) what is the process for such proposed appointment?

It is possible to make an application to the BVI Court for the appointment of an overseas insolvency practitioner, however, the overseas insolvency practitioner is required to act jointly with a licensee in the BVI or the Official Receiver. This provision is captured under Section 483 of the Act.

Circumstances where a creditor might consider the appointment of an overseas insolvency practitioner include situations where assets of the Company is situated outside of the BVI. In these situations, it is often helpful to have a foreign insolvency practitioner appointed in the jurisdiction of the assets as this can reduce costs of travel and the requirement of local expertise.

The process for such appointment requires written notice of the intention for the appointment of an overseas insolvency practitioner to the Financial Services Commission ("FSC").

The FSC has the power, under Section 484, to appear and be heard at the court hearing to appoint the overseas insolvency practitioner.

Where there is an application to the Court for the appointment of an overseas insolvency practitioner, the Court needs to be satisfied that:

- 1) He has sufficient qualifications and experience to act in the insolvency proceedings;
- 2) He has given written consent to act in the prescribed form;
- 3) He is not disqualified from holding a license under Section 477;
- 4) He is not disqualified from acting in the case of a company or a foreign company, under Subsection 482(2);
- 5) There is in force such security for the proper performance of his functions as may be specified in the Regulations.

Question 3.3 [maximum 5 marks]

Discuss the protections and options provided to secured creditors under the BVI insolvency framework.

The claims of a secured creditor is directly against the assets of the Company, which falls outside of a liquidation, and as such there is no timeframe for enforcing a security.

A secured claim is made whereby the assets of the Company are subject to a security, such as legal mortgages, equitable charges, floating charges, mortgages and charges over shares in the Company, and pledges.

Holders of a security of the assets of the Company have several options or remedies, depending on the type of asset that is secured. For example, where there is a security over the shares, the secured creditor can foreclose on the shares, sell the shares, or appoint a receiver over the shares.

Under a Bankruptcy

Under Section 298 of the Act, where there is a Bankruptcy, a secured creditor has the ability to make an application for the full amount of the liability. Under this application, he may state that he is willing to give up his security interest for the benefit of other creditors; or give an estimate of the value of the security interest and make an application for the full amount of the liability of the debtor, less the estimated value of the security interest.

However, should the secured creditor fail to disclose his security interest and a bankruptcy order is made, the secured creditor is deemed to have given up his security for the benefit of the other creditors.

A secured creditor is not obliged to make a claim in the Bankruptcy, however, he is able to do so under Section 338 of the Act. To do this, he must value the assets and claim as an unsecured creditor for the remainder of the debt as an unsecured creditor.

The secured creditor may apply to the trustee to amend the value that he placed on the security interest in his claim.

Commented [JW8]: 3 marks - Question states BVI Insolvency framework i.e. the Insolvency Act 2003. Procedures under BCA 2004 should not be included.
Not just liquidation - protection also in creditors arrangement section 15/bankruptcy section 311. Options to relinquish security interest in all insolvency procedures and can appoint receiver/admin receiver under s.115

Voluntary Liquidation

Under a Voluntary Liquidation (“VL”), while the goal of the VL is to deal with the assets of the company and pay any liabilities to dissolve the company, the liquidator is bound to give effect to the rights of the priority of the claims of a secured creditor pursuant to Section 197 of the BVI Business Companies Act, 2004 (“BCA”).

Insolvent Liquidation

Under Section 175(2) of the Act, where a liquidation commences and the liquidator has custody and control of the assets of the company, the rights of a secured creditor to take possession of and realise or otherwise deal with assets of the company is not affected.

Scheme of Arrangement

Under the BCA, a scheme of arrangement is a statutory mechanism which permits a company to enter a compromise between the company and its members or the company and its creditors. The scheme of arrangement can be initiated by the company, a creditor, shareholder or liquidator and is binding on all creditors, shareholders and the company once approved by the court.

In relation to the rights and protection of secured creditors, there is none afforded under a scheme of arrangement.

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

Question 4.1 [maximum 6 marks]

In September 2020 Pinforth Holdings Limited, a company incorporated in England, brought a claim against Expat Properties Limited, a company incorporated in the BVI, in the English High Court. Expat Properties did not attend the hearing and Pinforth Holdings was awarded judgment in the sum of USD 4,500,000.

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

The Reciprocal Enforcement of Judgements Act 1922 (the “1922 Act”) governs the recognition of foreign judgements in the BVI along with common law.

The 1922 Act is only effective where there are assets held in the BVI with which an enforcement can be made, and therefore, it will be important for the Pinforth Holdings Limited (“Pinfort”) to note that they will first need to identify these assets before making an application. In this case, it is noted that there is significant assets in the BVI.

A judgement under the 1922 Act is defined as any judgement or order which is given or made by a court in any civil proceedings, whereby the sum of money is made payable. In this case, there is an award judgement in the sum of USD\$4.5m.

Furthermore, only judgements made in the High Court of England and Wales and Northern Ireland and the Court of Session in Scotland, along with an extension to judgements

Commented [JW9]: BCA 2004 procedure not insolvency

Commented [JW10]: BCA 2004 procedure not insolvency

Commented [JW11]: 4 marks

made in the Bahamas, Barbados, Belize, Trinidad & Tobago, Guyana, St. Lucia, Grenada, Jamaica and New South Wales, can be recognised in the BVI under the 1922 Act.

Once Pinforth is successful in registering the judgement, the judgement is treated from the date of registration as being of the same force and effect as if it was made in the BVI, thereby allowing the remedies available under the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 ("CPR"), namely, a charging order, a garnishee order, a judgement summons, an order for seizure and sale of goods, and the appointment of a receiver.

The foreign judgement is only registrable within 12 months of the date of the judgement unless permission is granted by the Court for a longer period. The judgement is registered by an application of the creditor under CPR Part 72 and must contain certain prescribed information and include an authenticated copy of the judgement and details of any interest.

The application can be made without notice to the debtor, and the Court can order the creditor to give security for costs in relation to any proceedings that can be brought to set aside the registration.

The Court, under Section 3(2) of the 1922 Act, will not order a judgement to be registered in the event that:

- i) The original court did not have jurisdiction;
- ii) The 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 voluntarily submit or agree to submit to the jurisdiction of the Court;
- iii) The debtor was not duly served with the process of the original Court and did not appear, notwithstanding that he is ordinarily resident or carrying on business within the jurisdiction of the original Court, or agreed to submit to the jurisdiction of the Court;
- iv) The judgement was obtained by fraud;
- v) The debtor satisfies the Court that an appeal is pending or he is entitled to and intends to appeal; or
- vi) The judgement relates to a cause of action which could not have been entertained by the Court for reason of public policy (or similar).

Under this case, Pinforth will want to ensure that Expat Properties Limited ("Expat") was duly served and falls within the criteria noted above.

It should however be noted that it is not necessary for the Pinforth to register the judgement to enforce the debt as the procedures under the Insolvency Act are available.

Question 4.2 [maximum 9 marks]

Abbeydale Limited, a company incorporated in England, and Dendoncker Limited, a company incorporated in the BVI, entered into a loan agreement for the purchase of a property on Necker Island in the BVI. Under the terms of the loan agreement, Abbeydale transferred USD 12,000,000 to Dendoncker and Dendoncker successfully purchased the property. Subsequently, Dendoncker failed to make any of the loan repayments pursuant to the repayment clauses. As a result of this failure, Abbeydale made a demand for immediate repayment in full, as it was entitled to do under the agreement. Dendoncker failed to make any repayments in full or in part.

Commented [JW12]: What is the advice? The claim was 12 months but question does not state when judgment awarded but Expat did not attend hearing so if not registrable then common law remedy under doctrine of obligation action as specified sum or summary judgment

Commented [JW13]: No details

Commented [JW14]: 8 marks - First issue to determine is whether A is secured or unsecured creditor

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

The facts of the case being considered, namely that Abbeydale has submitted statutory demand for immediate repayment in full, and Dendoncker has failed to make a repayment in full or in part, allows for the consideration that Dendoncker, under the Act, can be considered Insolvent in the BVI. As such, the procedures available under the Act are available.

Commented [JW15]: Question does not state 'statutory' demand

The option available to Abbeydale are:

Liquidation

Abbeydale can appoint a liquidator via an application to the Court under Section 162 of the Act.

Should Abbeydale believe that it is critical to preserve the assets of the Company, they may apply under Section 170 of the Act for Interim Relief, whereby an application for the appointment of a liquidator is filed but not yet determined. In this instance, a Provisional Liquidator ("PL") can be appointed.

Commented [JW16]: Provisional Liquidator under section 170 can only be appointed when the petition to wind up has been presented to Court under section 162 and generally only where assets at risk

The Court will only approve the appointment of a PL where Dendoncker approves, or where the Court is satisfied that it is necessary for maintaining the value of the assets and it is in the public interest.

Under a Provisional Liquidation, the PLs have the same rights and powers of a liquidator, but only to the extent necessary to maintain the value of the assets owned or managed by Dendoncker or to carry out the functions for which he was appointed.

Appointment

For a liquidator to be appointed, the Court needs to be satisfied that the company is insolvent. The criteria for insolvency are that the company is unable to pay its debts as they fall due; the value of the company's liabilities exceeds the value of its assets; a company fails to satisfy in whole or in part, execution or other process issued on a judgement, decree or order of the BVI Court in favour of a creditor; or the company fails to comply with the terms of a statutory demand and it is not set aside under section 156 and 157 of the Act.

Once it is established that the company is insolvent, depending on the needs of Abbeydale, they can consider a Section 170 or Section 162 appointment as noted above.

Assuming that a Section 162 appointment is sought, Abbeydale, as a creditor can apply to the Court. Other considerations the Court can use to determine if the application may be granted is whether it is just and equitable or it is within the public's interest.

Impact

Upon appointment, :

- i) the liquidator has custody and control of the assets of the company;
- ii) The directors' powers ceases;

- iii) Unless the Court orders, no person may commence or proceed with any action against the company or its assets, or exercise or enforce, or continue to exercise or enforce any rights against the company or its assets;
- iv) No shares of the company may be transferred without an order of the court;
- v) No alteration may be made in the status of or to the rights or liabilities of a member, whether by amending the memorandum or articles or otherwise;
- vi) No member may exercise any power under the memorandum or article; and
- vii) No amendment may be made to the memorandum or articles.

Duties

The Liquidator owes duties to the company in liquidation and to the stakeholders, principally unsecured creditors. Under Section 185(1), the principal duties are to take possession of, protect and realise the assets of the company; to distribute the assets or the proceeds of realisation of the assets in accordance with the Act; and if there are any surplus assets, to distribute them, or the proceeds of realisation of surplus assets, in accordance with the Act.

Some statutory duties of the liquidator are to advertise his appointment; file notice with the registrar and to file notice of his appointment on the company.

While the above options are available to Abbeydale, it should be noted that the liquidator acts within the best interest of all creditors of the company they are appointed and not solely for Abbeydale. That is, the liquidator will consider if there are other creditors of Dendoncker who may need to be paid *pari passu* upon the realization of the company's assets.

If it is considered that Abbeydale is a secured creditor, they may want to consider the likely outcome of their claim within the liquidation.

Commented [JW17]: A secured creditor would not choose the insolvent liquidation route as it would have to value its security interest and have an unsecured balance in order to make such an application to wind up.

Pros & Cons

Under a liquidation, the liquidator has a wide range of powers under the Act to take control of the company and its assets and realise their value. However, their obligations are to unsecured creditors. Should Abbeydale be a secured creditor, while their security is not affected by the appointment of a liquidator and their rights remain, they may not participate in any distribution to unsecured creditors. This option of obtaining legal representatives and filing an application to the Court may also be time consuming, expensive and may last for an extensive period of time.

Receivership

In light of above, Abbeydale may want to consider the type of loan agreement and its terms to consider if there are other options available such as where there is a debenture, and a Receiver can be appointed over the Property. A Receiver's powers are expressly or impliedly set out in the charge instrument where appointed by a debenture. Receiverships are captured under Part IV of the Act, and includes Receivers appointed by a debenture, by the Court, and under or in accordance with any other enactment.

Commented [JW18]: If it has a debenture it can generally appoint an Administrative Receiver under the deed.

Where a Receiver is appointed by the Court, he is an agent of the Court and not the Company. His powers are set out in the order appointing him as receiver.

Firstly, the Act stipulates that a number of persons cannot be appointed Receiver, namely:

- 1) Mortgagee of any assets of the Company;
- 2) A person who is or was within the previous 2 years has been:
 - a. An officer or employee of a mortgagee of any asset of the company, or
 - b. A shareholder in or member of the company or a related company;
- 3) An individual who is disqualified from holding a license under Section 477;
- 4) An individual who will not be eligible to act as an insolvency practitioner pursuant to Section 482(2);
- 5) A body corporate;
- 6) The Official Receiver; and
- 7) Any other person as may be prescribed.

Commented [JW19]: Was loan registered as a charge at the Land Registry or on Dendoncker's Register of Charges?

However, the Court may appoint any person specified above as a Receiver, other than an Administrative Receiver.

Powers of a Receiver

Section 127(2) of the Act notes that the statutory powers of a receiver includes the powers to:

- i) Demand and recover income or assets of the company in respect of which he was appointed;
- ii) Issue receipts for income received ;
- iii) Manage, insure, repair and maintain the assets in respect of which he was appointed;
- iv) Exercise, on behalf of the company, a right to inspect books or documents that relate to the assets he was appointed.

Duties of a Receiver

The duties of a receiver. Under Section 128 of the Act are to:

- i) Act in good faith and for a proper purpose;
- ii) In a manner believed to be on reasonable grounds and in the best interest of the person in whose interest he is appointed.

The receiver will exercise his powers with reasonable regards to the interest of the Company, its creditors, sureties who may be called upon to fulfil the company's obligations, and persons claiming, through the Company, an interest in the assets in respect of which he was appointed.

Administrative Receivership

Finally, Abbeydale can consider the appointment of an Administrative Receiver ("AR").

Commented [JW20]: Out of court or court order - generally under a debenture or other such instrument

An AR effectively is a receiver who takes control of the whole or substantially the whole of the business, undertaking and assets of a Company. The appointment of an AR may be by an Order of the Court or by a debenture or other instrument of the company secured by a floating charge, whether or not that debenture or other instrument is also secured by one or more other security interest.

Powers of an AR

Notwithstanding the provision of the memorandum and articles of the company, the AR may:

- a. Execute all documents necessary or incidental to exercise his powers in the name or on behalf of the company;
- b. Use the company's seal

The powers conferred on an AR include powers specified in Schedule 1 of the Act.

*** End of Assessment ***