



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.

A company may only be liquidated under Part XII of the Business Companies Act 2004 if:¹

1. It has no liabilities; or,
2. It is able to pay its debts as they fall due and the value of its assets equals or exceeds its liabilities.

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, a person who is or has been an officer of the company is deemed to have committed an offence if, at any time whilst an officer or during the period of 12 months preceding the commencement of the liquidation, he has:²

1. 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,
2. Concealed or removed any of the company's assets since, or within, sixty days of the date of any unsatisfied judgment or order for the payment of money obtained against the company.

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 BVI Court has the following powers in relation to the orders the Court can make in support of foreign insolvency proceedings:³

1. 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;
2. Restrain the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property;
3. Require any person to deliver up to the foreign representative any property of the debtor or the proceeds of such property;

¹ Business Companies Act, s 197(1).

² Insolvency Act, s 289(1).

³ *Idem*, s 467(3).

Commented [JW2]: 1/2 mark - Section 199 (1) & (2) (subject to section 200) of the BCA 2004 sets out all the circumstances in which a voluntary liquidator can be appointed.

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

Commented [JW4]: 2 marks

4. Make such order or grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of a Virgin Islands insolvency proceeding with a foreign proceeding;
5. Appoint an interim receiver of any property of the debtor for such term and subject to such conditions as it considers appropriate;
6. Authorize the examination by the foreign representative of the debtor or of any person who could be examined in a Virgin Islands insolvency proceeding in respect of a debtor;
7. Stay or terminate or make any other order it considers appropriate in relation to a Virgin Islands insolvency proceeding; or
8. Make such other or grant such other relief as it considers appropriate.

Question 2.4 [maximum 4 marks]

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

A company will be considered insolvent in the BVI if:⁴

1. It fails to comply with the requirements of a statutory demand that has not been set aside under section 157 of the Insolvency Act;
2. Execution or other process issued on a judgment, decree or order of a Virgin Islands court in favour of a creditor of the company is returned wholly or partly unsatisfied; or,
3. Either:
 - a. The value of the company's liabilities exceeds its assets; or,
 - b. The company is unable to pay its debts as they fall due.

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

Question 3.1 [maximum 5 marks]

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

The liquidation of a company terminates on the first occurring of:⁵

- a) The making by the Court of an order terminating the liquidation;
- b) The filing by the liquidator of a certificate of compliance; or,
- c) The making by the Court of an order exempting the liquidator from the filing of a certificate of compliance.

⁴ *Idem*, s 8(1).

⁵ *Idem*, s 232.

Commented [JW5]: 4 marks

Commented [JW6]: 3 marks - no mention of BCA 2004 sections 207A-208 for voluntary liquidation. Termination does not always mean company is struck off or dissolved.

Court Application

A liquidator can make an application to the Court for an order terminating the liquidation if it is satisfied that it is just and equitable to do so. The Court may require the liquidator to file a report with respect to any matters relevant to the application.⁶

Final Report

As soon as practicable after completing his duties in relation to the liquidation of a company, the liquidator shall:⁷

1. Prepare and send to every creditor of the company whose claim has been admitted and to every member of the company:
 - a. His final report and a statement of realizations and distributions in respect of the liquidation, and,
 - b. A summary of the grounds upon which a creditor or member may object to the striking of the company from the Register; and,
2. File with the Registrar a copy of the final report and the statement of realizations and distributions sent to the creditors and members of the company.

It should be noted that on the application of the liquidator, the Court may on such terms and conditions as it considers just:⁸

- a) Exempt the liquidator from the requirement to send a final report, statement of realizations and distributions in respect of the liquidation, and summary of grounds upon which a creditor or member may object to the striking of the company from the Register; or,
- b) Modify the application of the relevant provisions as it relates to the final report to the liquidator.

Release of Liquidator

Upon termination of the liquidation, the former liquidator may apply to the Court for his release the effect of which would be to discharge him from all liability in respect of any act or default of his in relation to the administration of the company.⁹ However, with leave of the Court, the Court may make an order for a remedy (or remedies) against the former liquidator despite such release.¹⁰

Dissolution

In practice, upon termination and completion of the liquidation and release of the liquidator, the former liquidator would request the dissolution of the company from the Registrar. However, there is the possibility of the company continuing in business following the termination of the liquidation (such as where the liabilities upon which the liquidation was based were fully satisfied during the liquidation).

⁶ *Idem*, ss 233(1), (2) and (3).

⁷ *Idem*, s 234(2).

⁸ *Idem*, s 234(4).

⁹ *Idem*, s 235.

¹⁰ *Idem*, s 254(5).

Question 3.2 [maximum 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?

An overseas insolvency practitioner may be appointed in relation to a BVI company jointly with a licensee or the Official Receiver.¹¹

Creditor Considerations

When considering the appointment of an overseas insolvency practitioner, the creditor can take into consideration the worldwide location of the company's assets or potential assets. Having an experienced insolvency practitioner in the jurisdiction(s) of the assets can assist in saving the liquidation estate costs (including travel and accommodation, for example) as well as increase the ease of taking control of and realizing the assets whether it be physical tangible assets and foreign claims including those subject to litigation.

Procedure

The appointor of an overseas insolvency practitioner must be satisfied that:¹²

1. He has sufficient qualifications and experience to act in the insolvency proceeding in respect of which the appointment is made,
2. He has given his written consent to act in the prescribed form,
3. He is not disqualified from holding a licence,
4. He is not disqualified from acting in the case of a company or a foreign company,
5. There is in force such security for the proper performance of his functions, and,
6. Prior written notice of his appointment have been given to the Commission.

he Commission may:¹³

1. Appear and be heard at the hearing of a Court application for the purpose of objecting to the appointment, or
2. Give the appointor notice that it intends to apply to the Court for an order that the overseas insolvency practitioner concerned should not be appointed.

Generally, a letter is written to the Commission (either by the foreign insolvency practitioner or by the BVI insolvency practitioner) seeking approval of the appointment of the overseas insolvency practitioner. Such approval is usually received prior to the Court hearing and is included in the application in support of the appointment.

¹¹ *Idem*, s 483.

¹² *Idem*, s 483.

¹³ *Idem*, ss 484(1) and (2).

Commented [JW7]: 4.5 marks - section 483 IA2003

Commented [JW8]: BVI Licenced insolvency practitioner

Commented [JW9]: Financial Services Commission

Commented [JW10]: Its a form now

Question 3.3 [maximum 5 marks]

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

The commencement of the liquidation of a company does not affect the right of a secured creditor to take possession of and realize or otherwise deal with assets of the company over which that creditor has a security interest.¹⁴

The options available to the secured creditor under the BVI insolvency framework include the following which are discussed in further detail below:

1. Valuation of secured asset and claim in the liquidation for any shortfall
2. Surrender of secured asset and claim in the liquidation for entire liability
3. Sale of secured asset by liquidator
4. Redemption of security interest by liquidator at valuation of secured asset
5. Realization of secured asset and claim in the liquidator for any shortfall

Valuation and Surrender by Secured Creditor

A secured creditor may, but is not obliged to:¹⁵

1. Value the assets subject to security interest and claim in the liquidation of a company as an unsecured creditor for the balance of his debt; or
2. Surrender his 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 debt.

It should be noted that a secured creditor may subsequently apply to the liquidator to amend the value placed on the security in his claim.¹⁶

Sale by Liquidator

If the liquidator of a company is dissatisfied with the value placed on a security interest by a secured creditor, he may require the secured asset to be offered for sale.¹⁷ If the secured assets are offered for sale by public auction, the secured creditor is entitled to bid for and purchase it.¹⁸

Redemption by Liquidator

Where a secured creditor has valued the secured asset and claimed as an unsecured creditor for the shortfall, the liquidator may give notice to the creditor that he proposes to redeem the security interest at the value placed on it by the creditor.¹⁹ As mentioned above,

¹⁴ *Idem*, s 175(2).

¹⁵ *Idem*, s 211(1).

¹⁶ *Idem*, s 211(2).

¹⁷ *Idem*, s 211(4).

¹⁸ *Idem*, s 211(5).

¹⁹ *Idem*, s 212(1).

Commented [JW11]: 3.5 marks - Not just liquidation - protection also in creditors arrangement section 15/bankruptcy section 311/section 467. Options to relinquish security interest in all insolvency procedures and can appoint receiver/admin receiver under s.115/s142

the secured creditor has the option to amend the valuation of the secured asset subject to liquidator or court approval.

Realization by Secured Creditor

Where a secured creditor realizes his security interest and there is a surplus remaining from the net amount realized after satisfaction of the debt secured, the surplus should be returned to the liquidator. In the event there is a shortfall, the secured creditor may claim in the liquidation as an unsecured creditor for such balance of the secured liability.²⁰

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?

Registration Process

Pursuant to the Reciprocal Enforcement of Judgments Act 1922 (“the 1922 Act”), judgments of the English High Court are registerable in the BVI assuming the following requirements are met:²¹

1. Final and conclusive for a fixed judgment sum in civil proceedings
2. Registration application made within 12 months of the judgment
3. No appeal, right to appeal, or intention to appeal
4. Just and convenient
5. Jurisdiction
6. Not for penalties, fines or taxes

Final and Conclusive

Pursuant to the 1922 Act, the judgment must have been given by a Court in civil proceedings, must be final and conclusive and must be for a fixed judgment sum.²² Based on the facts of the case, the judgment appears to be final and conclusive and is for a fixed judgment sum. Assuming the judgment was given in civil proceedings, this requirement appears to have been met.

²⁰ *Idem*, s 213.

²¹ Mourant, “Recognition and Enforcement of Foreign Judgments and Arbitral awards”, at [https://www.mourant.com/2016-guides/recognition-and-enforcement-of-foreign-judgments-and-arbitral-awards-\(updated\).pdf](https://www.mourant.com/2016-guides/recognition-and-enforcement-of-foreign-judgments-and-arbitral-awards-(updated).pdf), accessed 6 July 2022.

²² *Ibid.*

Commented [JW12]: 5 marks - Claim date was more than 12 months but question does not state when judgment awarded and Expat did not attend hearing so not likely to be registrable but in common law remedy under doctrine of obligation action as specified sum or summary judgment then liquidation under section 162 IA2003

Timing

Pursuant to the 1922 Act, the application must be made within 12 months of the judgment being handed down subject to an extension being received from the BVI Court.²³ Based on the facts of the case, Expat Properties would be out of time given that we are now in 2022. Expat Properties will therefore have to apply to the BVI Court and seek approval of an extension of the 12-month deadline.

Right to Appeal

Pursuant to the 1922 Act, should the judgment debtor have appealed the judgment, have the right to appeal or expressed an intention to appeal, the judgment could be registered.²⁴ The facts of the case do not clarify this point and confirmation from Expat Properties would be required in this regard.

Just and Convenient

Pursuant to the 1922 Act, registration and enforcement of the judgment in the BVI must be just and convenient.²⁵ Based on the facts of the case, Expat Properties has significant assets in the BVI presumably upon which the judgment could be enforced. Therefore, on the face of it, it appears that the BVI Court would agree that this requirement has been met.

Jurisdiction

Pursuant to the 1922 Act, the following jurisdictional requirements must have been met in respect of the judgment:²⁶

1. The English High Court had jurisdiction; and,
2. The judgment debtor was properly served and appeared or submitted to the jurisdiction of the English High Court or carried on business or been ordinarily resident within the jurisdiction of the English High Court.

The facts of the case confirm that Expat Properties did not attend the hearing but it is not clear whether it was properly served or submitted to the English High Court, for example. Confirmation from Expat Properties in this regard, and on the remaining jurisdictional points, would be required.

Fines, Penalties, or Taxes

Pursuant to the 1922 Act, the judgment must not be for penalties, fines or taxes or similar fiscal obligations.²⁷ The facts of the case do not confirm what the judgment of USD 4,500,000 relates to but assuming that it is not in respect of the aforementioned fiscal obligations, this requirement would have been met.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

Enforcement

Once registered in the BVI, the judgment will have the same force as if it was originally received in the BVI.²⁸ As such, all of the relief available to BVI made judgments would be available to Expat Properties upon registration.

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.

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?

Security Interest

The facts of the case do not clarify whether the loan agreement created a security interest over the property on Necker Island (“**the Property**”) in favour of Abbeydale Limited. For the purposes of this question, **it is assumed that the loan is secured on the Property.**

Under BVI law, it is not necessary to register security interests to ensure the legality, validity, enforceability or admissibility in evidence of financing or security documents.²⁹ As such, the question of whether Abbeydale registered any security interests will not be addressed.

Under the Insolvency Act, Abbeydale has the option of placing Dendoncker Limited into receivership, into liquidation, or both. Each scenario is discussed below and in particular, the effect of the liquidation on Abbeydale’s (or the receiver, if so appointed) right to deal with the Property is clarified.

Receivership

The facts of the case do not clarify whether the loan agreement gives Abbeydale the power to appoint a receiver due to failure to make any repayments in full or in part. However, on the basis that it does, Abbeydale has the option of placing Dendoncker into receivership (out of court) pursuant to the terms of the loan agreement. The receiver would be charged with taking control of the property and realizing it for the benefit of Abbeydale. The Insolvency Act would apply to a receiver appointed under a security document as in this scenario.³⁰

²⁸ *Ibid.*

²⁹ Williams, Mike, “LENDING TO BVI COMPANIES – TAKING SECURITY”, at <https://www.collascrill.com/knowledge-documents/guides/lending-to-bvi-companies-taking-security/>, accessed 7 July 2022.

³⁰ Mourant, “The things a security taker needs to know about receivership under BVI law”, at [https://www.mourant.com/2016-guides/the-things-a-security-taker-needs-to-know-about-receivership-under-bvi-law-\(updated\).pdf](https://www.mourant.com/2016-guides/the-things-a-security-taker-needs-to-know-about-receivership-under-bvi-law-(updated).pdf), accessed 8 July 2022.

Commented [JW13]: 6 marks - First issue to determine: Is A secured or unsecured creditor? If secured - does it have registered charge/ debenture/ legal charge/equitable charge - have to see the loan document. Options under IA2003: Receiver /Administrative Receiver / Out of Court Receiver. If unsecured creditor then: Breach of contract – damages and obtain judgment from English Court in its favour – may be delay and costly; or obtain judgment in English court – recognised in BVI Court under IA 2003; or serve statutory demand under s155 IA2003 and then if unpaid application to the Court for liquidation under Section 162 for appointment of liquidator by the Court - winding up will only be made if insolvent. Provisional Liquidation can be appointed under section 170 if assets at risk of dissipation.

Commented [JW14]: Answer required advice on whether A was a secured or an unsecured creditor.

Insolvent

A company is insolvent if it fails to comply with the requirements of a statutory demand that has not otherwise been set aside.³¹

Statutory Demand

A creditor may make demand on a person for payment of a debt owed by that person to him. In respect of a secured debt, the full amount of the debt shall be specified in the demand. However, such demand must, amongst other things, give the person 21 days to pay the debt to the reasonable satisfaction of the creditor from the date of service of the demand.³²

Based on the facts of the case, Abbeydale made a demand for immediate repayment in full. Abbeydale will have to resubmit the demand in compliance with section 155 of the Insolvency Act for the purposes of proving the insolvency of Dendoncker.

Commented [JW15]: Not a statutory demand so would have to serve one if unsecured creditor or secured creditor for the unsecured balance of the debt and value its security.

Effect of liquidation

It should be noted that the commencement of liquidation of Dendoncker does not affect the right of Abbeydale to take possession of and realize or otherwise deal with the property on Necker Island over which it has a security interest.³³

For the avoidance of doubt, it should be noted that the commencement of liquidation also does not affect the power of a receiver to deal with the property over which it is appointed.³⁴

Appointment of liquidator by Court

The Court may appoint a liquidator of a company if the company is insolvent.³⁵ In respect of Dendoncker, Abbeydale would be able to prove its insolvency if it fails to comply with the requirements of the statutory demand (as mentioned above).

Abbeydale will be able to make the application to the BVI Court as creditor of Dendoncker.³⁶

Valuation and Surrender by Secured Creditor

A secured creditor may, but is not obliged to:³⁷

1. Value the assets subject to security interest and claim in the liquidation of a company as an unsecured creditor for the balance of his debt; or
2. Surrender his 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 debt.

It should be noted that a secured creditor may subsequently apply to the liquidator to amend the value placed on the security in his claim.³⁸

³¹ Insolvency Act, s 8(1)(a).

³² *Idem*, s 155.

³³ *Idem*, s 175(2)

³⁴ Mourant, "The things a security taker needs to know about receivership under BVI law", at [https://www.mourant.com/2016-guides/the-things-a-security-taker-needs-to-know-about-receivership-under-bvi-law-\(updated\).pdf](https://www.mourant.com/2016-guides/the-things-a-security-taker-needs-to-know-about-receivership-under-bvi-law-(updated).pdf), accessed 8 July 2022.

³⁵ Insolvency Act, s 162(1)(a).

³⁶ *Idem*, s 162(2)(b)

³⁷ *Idem*, s 211(1).

Sale by Liquidator

If the liquidator of a company is dissatisfied with the value placed on a security interest by a secured creditor, he may require the secured asset to be offered for sale.³⁹ If the Property is offered for sale by public auction, Abbeydale would be entitled to bid for and purchase it.⁴⁰

Redemption by Liquidator

Where a secured creditor has valued the secured asset and claimed as an unsecured creditor for the shortfall, the liquidator may give notice to the creditor that he proposes to redeem the security interest at the value placed on it by the creditor.⁴¹ As mentioned above, the secured creditor has the option to amend the valuation of the secured asset subject to liquidator or court approval.

Realization by Secured Creditor

Where a secured creditor realizes his security interest and there is a surplus remaining from the net amount realized after satisfaction of the debt secured, the surplus should be returned to the liquidator. In the event there is a shortfall, the secured creditor may claim in the liquidation as an unsecured creditor for such balance of the secured liability.⁴²

*** End of Assessment ***

³⁸ *Idem*, s 211(2).

³⁹ *Idem*, s 211(4).

⁴⁰ *Idem*, s 211(5).

⁴¹ *Idem*, s 212(1).

⁴² *Idem*, s 213.