



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]

Commented [JW2]: 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.

As regards directors, the directors of the company may appoint a voluntary liquidator by resolution as follows: (i) upon the expiration of the time specified in the company's articles or memorandum for the company's existence¹; (ii) upon the occurrence of a termination event specified in the company's articles or memorandum²; (iii) when a company limited by shares has not issued any shares³; (iv) or in any other case, the company's articles permit the directors to pass the appointment of a voluntary liquidator, and the members of the company approve the liquidation plan⁴.

As regards members, the members of a BVI company may by resolution approve a liquidation plan and appoint a voluntary liquidator: see §199(3)(a)-(b) CA 2004. For a members' resolution for the appointment of a voluntary liquidator, §199(4) goes on to state:

- Holders of a class of outstanding shares are only entitled to vote on the resolution if such holders are permitted to do so by the memorandum or articles of the company: see §199(4)(a) CA 2004;
- If a meeting of members is to be held, the company must give notice of the meeting and provide a copy of the liquidation plan to each member of the company, notwithstanding that a member may not be entitled to vote: see §199(4)(b); and
- If the company intends to obtain the written consent of the members, a copy of the liquidation plan is to be provided to each member, notwithstanding such member may not be entitled to consent to the plan: see §199(4)(c) CA 2004,

The above is subject to one important qualification. Namely that a voluntary liquidator who is a regulated person (i.e., holding a financial services licence) may not be appointed unless the Financial Services Commission (FSA) has (i) given its prior written consent to the company to be placed into voluntary liquidation⁵, and the FSA has approved the appointment of the regulated person: see §200(3)(b) CA 2004. Suppose the company fails to comply with §200. In that case, the resolution of the company to place it into voluntary liquidation and the subsequent appointment of the voluntary liquidator is void and of no effect: §200(4) CA 2004.

Once a voluntary liquidator is appointed under §199 of the CA 2004, the liquidator has a statutory duty to file the following documents with the Registrar of Companies: (1) notice of his appointment in the approved form⁶; (2) the declaration of solvency made by the directors of the company⁷; and (iii) a copy of the liquidation plan⁸. The voluntary liquidator must also advertise notice of his appointment within 30 days from the date the liquidator has filed the procedural documents under (i) –(iii) above: §204(b) CA 2004.

¹ §199(2)(a) CA 2004

² §199(2)(b) CA 2004

³ §199(2)(c) CA 2004

⁴ §199(2)(d) (i) – (ii) CA 2004

⁵ §200(3)(a) CA 2004

⁶ §204(1)(a)(i) CA 2004

⁷ §204(1)(a)(ii) CA 2004

⁸ §204(1)(a)(iii) CA 2004

Question 2.2 [maximum 2 marks]

Commented [JW3]: 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.

Upon the appointment of a liquidator by the BVI Court and the investigations into the affairs of the company, the directors of such company may be personally liable for civil and/or criminal penalties. One such offence is "fraudulent conduct" under §289 of the Insolvency Act 2003 (IA 2003). Section 289 provides that a person who has or is an officer of the company shall be deemed to commit the offence of fraudulent conduct if at any time in the period preceding the commencement of the liquidation said officer: §289(1) IA 2003:

- Has made or caused a gift or transfer of the company's assets or permitted a charge or execution against the company's assets⁹; or
- Has concealed or removed any of the company's assets within 60 days of the date of an unsatisfied judgment or order for the payment of money obtained against the company: see §289(1)(b) IA 2003.

For the purposes of section §289(1), an officer of a company shall not be deemed to have committed the offence of fraudulent conduct provided that (i) the conduct constituting the offence of fraudulent conduct occurred more than 5 years before the onset of the liquidation¹⁰, or (ii) the officer proves by evidence that at the time of the conduct constituting fraudulent conduct the officer carried out such conduct without the requisite intent to defraud the creditors of the company: §289(2)(b) IA 2003.

Question 2.3 [maximum 2 marks]

Commented [JW4]: 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?

Upon the application of a foreign officer holder for assistance in a foreign proceeding section 467 of the IA 2003 confers an extensive statutory power on the BVI Court to provide relief to the foreign office holder. In that regard, depending on the facts of each case, the BVI Court may make any of the following orders:

- (1) restrain the commencement or continuation of any proceedings against the debtor company's property: §467(3)(a) IA 2003;
- (2) save for the interests of a secured creditor¹¹, restrain the creation or enforcement of any right against a debtor company's property: §467(3)(b) IA 2003;
- (3) require any person to deliver up the debtor company's property or proceeds of such property to the foreign officer holder: §467(3)(c);
- (4) make any such order that the court considers appropriate to facilitate the coordination of BVI insolvency proceedings with the foreign proceeding: §467(3)(d) IA 2003;

⁹ §289(1)(a) IA 2003

¹⁰ §289(2)(a) IA 2003

¹¹ §467(4) IA 2003

- (5) appoint an interim receiver over any property of the debtor on such terms as it deems appropriate: §467(3)(e) IA 2003;
- (6) Authorize the foreign office holder to examine the debtor or any person permitted by BVI insolvency law: §467(3)(f) IA 2003; or
- (7) Stay or terminate or make any other orders it considers appropriate in the BVI insolvency proceeding: §467(3)(g) IA 2003.

The BVI Court, in considering whether to grant any of the relief mentioned above, must have regard to what will be necessary for the expeditious administration of the foreign proceeding,¹² provided that it is consistent with the following principles: (i) the just treatment of all persons claiming in the foreign proceedings: §468(1)(a) IA 2003; (ii) the court must balance the protection of persons in the BVI who have claims against the debtor company against the prejudice caused in prosecuting the claims in the foreign proceedings: §468(1)(b) IA 2003; (iii) the prevention of fraudulent or preferential dispositions of property subject to the foreign proceeding: §468(1)(c) IA 2003; (iv) the need for distributions to the claimants in the foreign proceedings to be substantially under the order of distributions under BVI law: §468(1)(d) IA 2003; and (v) the common law principle of comity: §468(1)(e) IA 2003.

Furthermore, §468(2) and (3) provide that the BVI Court shall not grant any order under §467 without the consent of the affected person where the effect of such order would affect the right of any creditor to benefit from the right of any set-off¹³; result in a preferential creditor under BVI law from receiving less than he would receive in a BVI insolvency proceeding¹⁴; or make the order if such order is contrary to BVI public policy: §468(3) IA 2003.

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 the IA 2003, a BVI or foreign registered company will be insolvent if (1) the company fails to comply with a statutory demand which is not set aside (discussed in further detail below): §8(1)(a) IA 2003; (2) execution of a judgment or order of the BVI Court is returned wholly or partially unsatisfied: §8(1)(b) IA 2003; (3) the company is cash flow insolvent, meaning that the value of the company's liabilities exceeds its assets: §8(1)(c)(i) IA 2003; or (4) the company is balance sheet insolvent, meaning the company is unable to pay its debts as they fall due: §8(1)(c)(ii) IA 2003.

In the case of a creditor with an outstanding debt, the creditor may serve a statutory demand by making a written demand for payment of the debt to the debtor company. Under BVI law, the statutory demand must satisfy the following requirements (i) the debt subject to the statutory demand must be in respect of a debt not less than \$2,000¹⁵ and is due and payable on the date of the demand: §155(2)(a) IA 2003; (2) be in writing and specify the nature of the debt and its amount: §155(2)(b) IA 2003; (3) must be dated and signed by the creditor or by a person authorized to sign on behalf of the creditor: §155(2)(c) IA 2003; (4) require the debtor to pay or compound the outstanding debt within 21 days from the date of service: §155(2)(d) IA 2003; (5) expressly state that failure to pay the debt within the proscribed statutory period may result in an application to the BVI Court for the appointment of a liquidator: §155(2)(e)

¹² §468(1) IA 2003

¹³ §468(2)(a) IA 2003

¹⁴ §468(2)(b) IA 2003

¹⁵ §149(1) of the Insolvency Rules 2005

IA 2003; (6) set out the rights of a debtor company to set aside the statutory demand: §155(2)(f) IA 2003; and (7) comply with the rules for service of such demand: §155(2)(g) IA 2003.

A debtor who wishes to set aside the statutory demand must make such an application within 14 days of service of the demand¹⁶ and give the creditor 7 days' notice of the hearing to set aside the demand: §156(5) IA 2003. At the set aside hearing, the BVI Court may set aside the statutory demand if it is satisfied that (i) there is a substantial dispute as to whether the debt is due and owing¹⁷; (ii) the debtor company has a reasonable prospect to establish a set off or counterclaim that exceeds the debt¹⁸; (3) the creditor holds a security interest in the debt, and the value is greater than the outstanding debt¹⁹; or (iv) a substantial injustice would occur due to the creditor to comply with the statutory requirements²⁰ or for some other reason: §157(2)(b) IA 2003.

If the statutory demand is not set aside or the company is insolvent on a cash flow or balance sheet basis, an application may be made to the BVI Court for the appointment of a liquidator under §162(1)(a) of the CA 2003.

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.

Under section 232 of the IA 2003, a BVI liquidation shall terminate on the occurrence of (i) an order of the BVI Court under §233 of the IA 2003: §232(a) IA 2003; (ii) the filing of a certificate of compliance by the liquidator: §232(b) IA 2003; or (iii) the making of an order by the BVI Court exempting the liquidator from complying with the requirement to file a certificate of compliance: §232(c) IA 2003.

Regarding the completion of the liquidation, §234 of the IA 2003 sets out the statutory steps which must be complied with before filing a certificate of compliance to terminate the liquidation. Specifically, upon the completion of a liquidator's duties (i.e., securing the assets, realizing the assets of the debtor company, adjudicating proofs of claims, and distributing the assets to the creditors who have proved their debts), the liquidator must prepare and send to each creditor whose claim has been admitted in the liquidation and each member of the company his final report: §234(2)(a) IA 2003. The final report must contain a statement that all known assets of the company have been discharged, realized, or discharged without realization: §234(3)(a) IA 2003; all proceeds of realization have been distributed: §234(a)(b) IA 2003; and there is no reason why the company should not be dissolved and struck off by the Registrar of Companies: §234(3)(c) IA 2003.

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

Commented [JW6]: 3 marks - no mention of BCA 2004 sections 207A-208 - termination does not always mean company is dissolved.

Commented [JW7]: 5 marks

¹⁶ §156(2) IA 2003

¹⁷ §157(1)(a) IA 2003

¹⁸ §157(1)(b) IA 2003

¹⁹ §157(1)(c) IA 2003

²⁰ §157(2)(a) IA 2003

a creditor consider the appointment of an overseas insolvency practitioner; and (ii) what is the process for such proposed appointment?

The short answer is yes. However, an overseas insolvency practitioner may only be appointed jointly with a BVI practitioner. In practice, the appointment of an overseas insolvency practitioner may be appropriate where the company holds substantial assets outside of the BVI. By way of example, a BVI company may be a Hong Kong listed company, and one of its significant assets is the company's listing status on the exchange. In these circumstances, it may be beneficial to the creditor to appoint a Hong Kong insolvency practitioner with a BVI practitioner. This is because the Hong Kong practitioner will be familiar with the relevant procedures and laws in the foreign jurisdiction. The effect of a joint appointment has the advantage of minimizing the costs for the effective cross-border liquidation of the company.

Section 483 of the IA 2003 provides that an individual resident outside of the BVI may be appointed jointly with a BVI officer holder or official receiver, provided certain statutory requirements are met. First, the court or person appointing the overseas practitioner must be satisfied that: (i) the overseas practitioner has sufficient expertise and qualifications to act in the insolvency proceeding for which the appointment is made: §483(a)(i) IA 2003; (ii) he has given his consent to act in the liquidation in the proscribed form: §483(a)(ii) IA 2003; (iii) he has not been disqualified from holding a licence (i.e., he is not bankrupt or a disqualification order has been made against him): §483(a)(iii) IA 2003; (iv) he is not disqualified from acting in the case of a company or foreign company (i.e., the nominee has not been the auditor of the company or an employee of the auditor of the company at any time in the previous three years): §483(a)(iv) IA 2003; (v) security has been lodged for the proper performance of his duties: §483(a)(v) IA 2003; and (vi) give prior written notice to the FSA.

As indicated above, prior to filing the application with the court, approval for the appointment of the foreign practitioner must be sought from the FSA. This involves completing the Insolvency Services Joint Appointment of Overseas Insolvency Practitioner Form for consideration by the FSA. In support of the form, the FSA must be provided with a copy of the foreign practitioner's licence and CV.

Further to §484 of the IA 2003, the Commissioner of the FSA has the standing to appear and be heard on the court application for the appointment of the foreign practitioner. If the Commissioner of the FSA intends to oppose the appointment, he/she may give notice of the same in advance of the hearing.

Question 3.3 [maximum 5 marks]

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

In insolvency, a secured creditor has been afforded certain protections under BVI law. The statutory moratorium triggered upon the appointment of a liquidator in compulsory liquidation does not affect the secured creditor's right to take possession of the asset or realize the asset subject to the secured interest: §175(2) IA 2003. Thus, the secured party has recourse to enforce its security outside of the insolvency process. In practice, the security instrument will provide the circumstances which constitute a contractual event of default for the appointment of a receiver with a view to selling the asset. In general terms, a security instrument will confer the power on the receiver to take possession of the secured asset, manage the asset, and sell the asset.

Commented [JW8]: 2 marks - not just liquidation protection also in creditors arrangement/bankruptcy. Options to relinquish security interest in all insolvency procedures and can appoint receiver/admin receiver under s.115.

If the realization of the security is insufficient to satisfy the secured party's debt in full, the IA 2003 permits the secured party to claim in the liquidation for the debt balance: §211(1)(a) IA 2003. Suppose the secured party adopts this approach and the proceeds of sale net a surplus. In that case, the secured party is under a statutory obligation to account to the liquidator for such surplus: §213(1) IA 2003.

Where a secured creditor claims in liquidation for the balance of its debt as an unsecured creditor, section 212(1) permits the liquidator to give written notice to the secured party that within 28 days of such notice, the liquidator intends to redeem the value of the security at the value placed on it by the creditor: §212(1) IA 2003. If, for any reason, the circumstances have changed which affect the value placed on it by the secured party, said party, within 21 days of receiving notice, may revise the value placed on the security: §212(2). If a secured creditor fails to disclose its secured interest in liquidation, the secured party will surrender its secured interest in the asset for the general body of the company's unsecured creditors: §214(1) IA 2003.

Alternatively, if so advised, a secured party may elect to surrender its secured interest to the liquidator and claim for the full value of his claim as an unsecured creditor in the company's liquidation: §211(1)(b) IA 2003.

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?

A party who wishes to enforce a foreign monetary judgment of the English High Court may do so under the Reciprocal Enforcement of Judgments Act 1922 (RE 1922) under §3(1) of the RE 1922. The English High Court Judgment registration should be a straightforward and relatively inexpensive exercise, provided there are no statutory bars to registration.

The application to Register the judgment creditor would make the English Judgment, Pinforth Holdings Limited (PL) under part 72 of the Eastern Caribbean Supreme Court Procedure Rules (CPR) without notice to Expat Properties Limited (EL). Such application must be made within 12 months of the English High Court Judgment: §3(1) RE 1922. The RE 1922 then goes on to state at §3(2) that no judgment shall be registered if:

- (1) The High Court of England acted without jurisdiction: §3(2)(a) RE 1922;
- (2) The judgment debtor was not within; or did not submit to the jurisdiction of the High Court of England and Wales: §3(2)(b) 1922;
- (3) EL was within the jurisdiction but was not properly served the proceedings: §3(2)(c) 1922;
- (4) The judgment was obtained by fraud: §3(2)(d) 1922;

Commented [JW9]: 4 marks - claim was 12 months does not state when judgment awarded and Expat did not attend hearing so if not registrable then common law remedy under doctrine of obligation action as specified sum or summary judgment

(5) The judgment is under appeal, or EL has the right to or has expressed an intention to appeal: §3(2)(e) 1922; or

(6) The judgment was in respect of a cause of action which is against the public policy or for some other reason that the BVI Court could not have entertained: §3(2)(f) 1922.

Based on the facts, they give rise to two potential hurdles for registering PL's High Court judgment in the BVI. As indicated above, PL commenced its claim in the English High Court in September 2020. It is not clear from the available information the date on which the High Court entered judgment in favour of PL. On the assumption that the date PL's judgment was entered falls outside of the 12-month window for registration (§3(1) Re 1922), this is not necessarily the end of the matter. Having said that, it will be necessary for a further application to the court to seek permission to extend the time for registration. In that regard, the test the BVI Court will apply is whether it is "just and convenient to do so."

The second hurdle, which is likely more problematic for PL, is whether EL submitted to the jurisdiction of the English High Court. If EL did not submit to the jurisdiction and failed to appear at the hearing, then the statutory bar under §3(2)(b) Re 1922 applies, and the judgment is not capable of registration and enforcement of the BVI.

If, however, I am wrong and there is no statutory bar to the recognition and enforcement of the English High Court judgment – PL must serve a copy of the recognized English High Court Judgment on EL. Upon service of the judgment, the English High Court Judgment shall be of the same force and effect in the BVI as if it had been initially obtained in the BVI on the registration date: §3(3)(a) RE 1922.

Question 4.2 [maximum 9 marks]

Commented [JW10]: 8 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?

As a preliminary point, it is not clear from the facts, but if the Loan Agreement granted security or a charge over the property on Necker Island, Abbeydale Limited (AL) may be entitled to enforce its security against the asset under the express terms of the Loan Agreement. To the extent that there is a difference between the value of Necker Island (if security was granted) and the 12m loan, under §211(1) of the IA 2003, AL could claim for the balance as an unsecured creditor if Dendoncker Limited (DL) was placed into liquidation. Accordingly, reviewing the express terms of the Loan Agreement will be necessary to determine whether security has been granted over the property on Necker Island.

Commented [JW11]: If risk of dissipation of asset ask Court for Provisional Liquidator under section 170 to be appointed whilst waiting for winding up order to be heard - if delay

If DL did not grant security in favour of AL, AL has three potential routes to enforce its rights against DL. First, AL could bring a claim for breach of the loan agreement and obtain a judgment in favour of AL. In the event a judgment is obtained, this could form the basis of

insolvency if the judgment is not satisfied in whole or in part: §8(1)(b) IA 2003. Second, given DL's current financial position and failure to make repayments under the Loan Agreement, an application may be made for the appointment of a liquidator under §162(1) of the IA 2003. Finally, if the Loan Agreement does not provide for the appointment of a receiver, an application to the BVI Court for a court-appointed receiver.

As regards a claim in the BVI Courts, it must be borne in mind that this will involve a two-stage process. First, AL would be required to bring a claim against DL for breach of contract to be determined by the BVI. In this case, it is difficult to see what defence could be raised against AL's claim; therefore AL may seek summary judgment on its claim. Be that as it may, this process would likely take at least 6 months to a year before a monetary judgment is obtained. Moreover, as AL is an English-registered company, DL could delay the proceedings by seeking an order for security for costs. If AL wishes to adopt this course, upon a judgment being entered in its favour, AL will have to apply to the BVI Court for an Enforcement Order under the CPR part 43. The following remedies relevant to the facts of this case would be available to AL (i) a charging order (Part 48 of the CPR); (ii) an order for the sale of land (Part 55 of the CPR); or (3) an order for the appointment of a receiver (Part 51 of the CPR). As indicated above, this would involve a two-stage process which would be both time-consuming and costly. Another factor that weighs against adopting this course of action, especially in light of DL's financial difficulties, is that a creditor of DL, while the proceedings are afoot, may apply for the appointment of a liquidator. As a consequence, AL may incur significant expense and then be in a position where it would not be able to continue or commence such proceedings in an insolvency scenario. The advantage of this approach and any of the above enforcement methods is that AL would be able to enforce its debt solely against DL.

In light of the above, a more straightforward path to recovery of its debt may be for AL to enforce its rights under the IA 2003. First, it would be open to AL to commence liquidation proceedings and seek the appointment of a liquidator. While this procedure may result in a more efficient method of enforcement, the liquidation of DL, unlike civil proceedings, is a class remedy to benefit DL's general body of unsecured creditors. In the liquidation context, a liquidator would secure the assets of DL, realize the same, adjudicate the proofs of debt, and distribute the realizations after the payment of the liquidator's expenses and other statutory priorities to the creditors on a *pari passu* basis. Thus, if the assets of DL are insufficient to satisfy the unsecured creditors' claims in full, the creditors will each receive a pro rata distribution of the assets. In this scenario, depending on the number of creditors and debts of DL, this may result in AL recovering less than the full 12m due and owing. In this scenario, a decision must be taken on the basis upon which the application is grounded. It would be open to proceed on the basis that DL is balance sheet insolvent because DL is unable to pay its debts as they fall due: §8(1)(c)(ii). Alternatively, AL could serve a statutory demand under §155 of the IA 2003. If DL fails to pay or compound the payment within 21 days, DL will be deemed insolvent. In either case, an application may then be made under §161 of the IA 2003 for the appointment of the liquidator. AL would then have to prove its debt in the liquidation of AL. As an unsecured creditor, further to §209(1) of the IA 2003 AL will be required to submit its claim against the company (i) in writing; and (ii) signed by the creditor. The liquidator may require AL to submit an affidavit that provides further particulars of his claim, documentary, or other evidence to substantiate his claim: §209(2) IA 2003.

Finally, as indicated above, if the Loan Agreement does not expressly provide for the appointment of a receiver, AL may seek the appointment of a receiver by the court. The receiver's powers will be limited to the powers granted under the order appointing the receiver: §127(1)(b) IA 2003. In this case, AL should seek from the BVI Court that the receiver is appointed with power of sale over Necker Island. If such power is granted by the Court, the receiver will owe a statutory duty to DL to obtain the best price obtainable at the time of the sale: §129(1)(d) IA 2003. The one disadvantage to this approach is the costs of the receiver. Thus, if Necker Island is sold for less than 12m, AL should expect a further reduction in its

Commented [JW12]: If a debenture then Administrative Receiver can be appointed

recovery, taking into account that the receiver's expenses and fees incurred in securing the asset and subsequent sale shall be paid out of the proceeds of such sale: §134 IA 2003.

*** End of Assessment ***