



**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 section 197(1) of the Business Companies Act 2004 (BCA), a company can be liquidated under Part XII if (a) it has no liabilities; or (b) if it is able to pay its debts as they fall due and the value of the assets is equal to or exceeds its liabilities. Under section 199(1) of the BCA, the circumstances in which a voluntary liquidator can be appointed (if one of the requirements of section 197(1) are satisfied) are (a) by resolution of the directors; or (b) resolution of the members<sup>1</sup>.

**Commented [JW2]:** 1 mark - Section 199 (1) & (2) (subject to section 200) of the BCA 2004 - not all included here

**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.

Section 289(1) of the Insolvency Act (IA) provides that where a liquidator has been appointed 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: (a) made or caused to be made any gift or transfer of, or charge on, or has caused, permitted or acquiesced in the levying of any execution against the company's assets; or (b) has concealed or removed any of the company's assets since, or within, sixty days of the date of any unsatisfied judgment or order for the payment of money obtained against the company.

However, a person is not guilty of an offence under this section: (a) by reason of conduct constituting an offence (in relation to a gift, etc.) which occurred more than five years before the commencement of the liquidation; or (b) if he proves that, at the time of the conduct constituting the offence, he had no intent to defraud the company's creditors.

**Commented [JW3]:** 2 marks

**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?

Part XIX of the IA provides the primary framework for the powers provided to the BVI Court to make orders in aid of foreign insolvency proceedings which include recognising certain foreign proceedings and providing assistance to foreign representatives. The power to make such orders extends to designated countries<sup>2</sup>. Under section 467(3) of the IA, the BVI Court has wide powers in relation to the specific orders it can make, which include:

- a. restraining the commencement or continuation of any proceedings against a debtor or its property;
- b. restraining the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property;
- c. requiring the delivery up of property belonging to the debtor or the proceeds of such property;

<sup>1</sup> Subject to the BCA, s200, where the company is regulated by the Financial Services Commission.

<sup>2</sup> Australia, Canada, Hong Kong, Japan, Jersey, New Zealand, the United Kingdom and the USA.

**Commented [JW4]:** 2 marks

- d. ordering or granting relief to facilitate, approve or implement arrangements that will result in a co-ordination of BVI insolvency proceedings with a foreign proceeding;
- e. appointing an interim receiver of any property of the debtor for such term and subject to such conditions as it considers appropriate;
- f. authorising the examination by the foreign representative of the debtor or of any person who could be examined in a BVI insolvency proceeding; or
- g. staying or terminating or making any other order it considers appropriate in relation to a BVI insolvency proceeding.

**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.

Although on considering the appointment of a liquidator, the Court retains residual discretion as to whether it should find a company insolvent and so appoint, there are circumstances in which a company can be considered insolvent based on statutory tests of insolvency.

Firstly, it will be proved to the satisfaction of the Court under section 8(1)(c)(iii) of the IA that a company is unable to pay its debts as they fall due (a question of fact, commonly known as "cash-flow" test). Unless this is disputed, satisfying this test is sufficient evidence of insolvency<sup>3</sup>.

Secondly, it will be proved to the satisfaction of the Court under section 8(1)(c)(i) of the IA that the value of the company's liabilities exceeds the value of its assets ("balance sheet" test). Section 10(1) of the IA provides a wide definition of liability and for these purposes includes a debt. Section 10(2) of the IA further provides that a liability may be present or future, certain or contingent, fixed or liquidated, sounding only in damages or capable of being ascertained by fixed rules or as a matter of opinion. It has been confirmed by the BVI Court of Appeal that a company may not be considered balance sheet insolvent where the value of the company's assets became lower than its liabilities only for a short period<sup>4</sup>.

Thirdly, insolvency can also be established where a company fails to satisfy (in whole or in part) execution or other process issued on a judgment, decree or order of the BVI Court in favour of a creditor of the company.

Fourthly, if a company fails to comply with the terms of a statutory demand made in the format required by section 156 of the IA within 21 days of service of the demand, and it is not successfully set aside under sections 156 and 157 of the IA (most commonly on the grounds that the debt is disputed), this will also *prima facie* establish insolvency for the purposes of the provisions relating to corporate insolvency under Part VIII of the IA.

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

**Question 3.1 [maximum 5 marks]**

**Commented [JW6]:** 2.5 marks - Section 232 termination of a liquidation on first of three events occurring: Order terminating liquidation, Filing of Certificate of compliance by Liquidator, Making of a Court order exempting the liquidator from filing a Certificate of Compliance. No mention of section 207A -208 BCA 2004 for termination of a voluntary liquidation.

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

When preparing to terminate a liquidation as soon as reasonably practicable after the completion of his duties, the liquidator must prepare his final report, as required by section

<sup>3</sup> See the English case of *Cornhill Insurance Plc v Improvement Services Limited* [1986] 1 WLR 114

<sup>4</sup> *Trade and Commerce Bank v Island Point Properties SA* BVICA 2009/0012

234(2) of the IA. In terms of the content of the report, section 234(3) requires certain statements to be included.

This final report must be sent to every creditor and member of the company, and also filed with the Registrar. However, the liquidator may make an application to the Court exempting him from compliance with the requirement to send the final report to all known creditors or modify the entire provision with regard to the final report (this is addressed further below).

Upon the liquidator having complied with the requirements of section 234 of the IA (having filed a certificate of compliance), the liquidation of a company is terminated. The other two ways termination can occur (and this being whichever of the three events occurs first) are (i) the court makes an order terminating the liquidation or (ii) the court makes an order exempting the liquidator from having to file a certificate of compliance (as alluded to above).

Where the liquidator does not file a statement of compliance, then on the application of a liquidator, creditor, director, member or the Official Receiver, the Court may make an order for the termination of the liquidation at any time, if it is just and equitable to do so.

The liquidator can also apply for their release when their appointment ends in conjunction with and in readiness of termination of the liquidation pursuant to section 235 of the IA. The effect of release is to discharge the liquidator from all liability in respect of any act or default in relation to the liquidator's administration of the company. The exception to this being that the Court can still make an order under section 254 of the IA (where misfeasance is found to have been committed by the liquidator as an officeholder) notwithstanding the liquidator's release under section 235 of the IA.

Finally, on termination and completion, section 336 of the IA states that the IR will provide for dissolution of a company, however, this is actually not the case as no such procedure has been legislated for. If dissolution is appropriate (noting there are some cases in which it will not be, if, for example, the liquidation is terminated but the company can / wishes to continue in business), then the once the liquidator has filed his final report and been released, the liquidator will write to the Registrar / Financial Services Commission to request that the company be resolved.

**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?

Appointment of an overseas insolvency practitioner is possible pursuant to section 483 of the IA, if the requirements of that section (and set out below) are satisfied:

(a) where appointed by the Court, or in any other case the person(s) appointing he or she, is / are satisfied that:

(i) he / she has sufficient qualifications and experience to act in the insolvency proceeding in respect of which the appointment is made;

(ii) he / she has given his or her written consent to act in the prescribed form;

(iii) he / she is not disqualified from holding a license under section 477 of the IA;



(iv) he / she is not disqualified from acting in the case of a company or foreign company, under section 482(2) or in the case of an individual, under subsection 482(3);

(v) there is in force such security for the proper performance of his / her functions as may be specified in the Regulations' and

(b) prior written notice of his / her appointment has been given to the Commission (the FSC).

Because BVI companies may have assets which are situated outside of the BVI, a creditor might consider it helpful to seek to effect an appointment of an overseas insolvency practitioner who is from a jurisdiction in which assets are held. This may serve to be cost-effective in reducing travel and other costs which might be incurred if the BVI liquidator is required to travel to other jurisdictions. Indeed, this is common place and works well in long-running liquidations which involve multiple disputes and assets in different jurisdictions.

The requirements of section 483 include that the overseas practitioner will need to be appointed jointly with a BVI licensed insolvency practitioner or the Official Receiver. In addition, as is clear from section 483(b), the process for appointing an overseas practitioner must start with prior written notice of the intended appointment being provided to the FSC<sup>5</sup>. This is usually in the form of a letter detailing the foreign practitioner's expertise and experience. The FSC may then approve the appointment, subject to Court approval where relevant. However, the FSC has the power to appear and be heard on any application to the Court to appoint an overseas practitioner (where applicable) and can object to the appointment<sup>6</sup>. If the FSC gives notice of an intention to object, section 484(3) provides that the overseas insolvency practitioner shall not be appointed unless the Court subsequently approves the appointment at the hearing of the FSC's application objecting to the appointment or the FSC approves the appointment. A person who contravenes section 483(3) is guilty of an offence<sup>7</sup>.

### Question 3.3 [maximum 5 marks]

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

The protections and options provided to secured creditors begin firstly in how security is registered. There are two ways to register charges under BVI law. Firstly, section 162 requires a company to keep at its registered office or the office of its registered agent a register of all relevant charges. Although not available for public inspection, the company can be fined up to US\$5,000 for a failure to maintain its register of charges. This adds an extra layer of protection for any secured creditor. However, even if there is a failure by a company to maintain its register, the charge held by a creditor would still be valid and enforceable on its terms. Secondly, section 163 sets out the rules for the public registration of charges. A secured creditor (as well as the company) can apply to the Registrar to register its charge. The Registrar is required to keep a Register of Registered Charges with respect to each company<sup>8</sup> and upon an application will update the register with the secured creditor's charge and will issue a certificate. Although public registration is not mandatory, it is advisable (and so generally done), because it is the public register and not a private register that determines the priority of security under BVI law.

<sup>5</sup> Section 483 of the IA

<sup>6</sup> *Idem*, section 484

<sup>7</sup> *Idem* section 484(4).

<sup>8</sup> *Idem*, section 163(3)

**Commented [JW8]:** 3 marks -not just liquidation and bankruptcy - protection also in creditors arrangement. Options to relinquish security interest in all insolvency procedures and can appoint receiver/admin receiver under s.115/142

**Commented [JW9]:** Which Act?

Secured creditors are not participating creditors in the insolvency process of a BVI company<sup>9</sup>. This is because their claims are directly against the assets of the Company over which the relevant security is held and fall outside of the liquidation process. The secured creditor can elect to take control of its security interest at any time and is not subject to any of the timelines for the enforcement of its secured claim.

How a charge is enforced depends on the property and type of security instrument. In the case of a legal mortgage, the legal title of the property must be conveyed to the security taker. In the event of default under the mortgage or charge: (i) foreclosure on the property charged; (ii) sale of the property; or (iii) the appointment of a receiver. In the case of a mortgage or charge over shares of a BVI company, section 66 of the BCA does not prescribe the form for this security but does require the following: (a) the agreement to be in writing and signed by (or with the authority of) the holder of the shares to which the mortgage or charge relates<sup>10</sup>; (b) clear indication of the intention to create the mortgage or charge<sup>11</sup>; and (c) clear indication the amount secured by the mortgage or charge and how such amount it to be calculated<sup>12</sup>. These requirements provide certainty for the secured creditor which will be of benefit should enforcement ever be required. The holder of a mortgage or charge over shares has the same three remedies for enforcement as the holder of a legal mortgage.

However, where an insolvency proceeding is afoot, section 211 of the IA permits a secured creditor to (a) value the assets subject to a security interest and claim in the liquidation of a company as an unsecured creditor for the balance of his debt; or (b) surrender the security for the general benefit of creditors and claim in the liquidation as an unsecured creditor for the full amount of his debt. This is an option for any secured creditor but it is not mandatory and a secured creditor can remain outside of the insolvency process if so desired.

In the case of a bankruptcy of an individual, a secured creditor may apply for a bankruptcy order against the debtor. The application must state the full amount of the liability and in addition, state that he is willing, in the event an order is made 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 the application in respect of the full amount of the liability of the debtor to him less the estimated value of the security<sup>13</sup>. A secured creditor must disclose his security interest as if he does not and a bankruptcy order is made, he is deemed to have forfeited his security for the benefit of other creditors. However, an application for relief can be made in this instance under section 299(2) if there was inadvertent failure or honest mistake to not disclose. Where any amount is unsecured, the secured creditor is treated as an unsecured creditor<sup>14</sup>. Although not obliged to make a claim in any bankruptcy, can be submitted to the trustee where a bankruptcy order has already been made under section 338 of the IA.

#### **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.

<sup>9</sup> *Idem* section 185(2)

<sup>10</sup> BCA section 66(1)

<sup>11</sup> *Idem* section 66(3)(a)

<sup>12</sup> *Ibid*

<sup>13</sup> IA, section 298(1)

<sup>14</sup> *Idem*, section 298(2)

**Commented [JW10]:** 5 marks - So if not registrable then common law remedy under doctrine of obligation action as specified sum or summary judgment and possibly liquidation.

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?

On the basis that it is said Expat Properties (**EP**) has significant assets in the BVI, there is merit in seeking recognition and thereafter, enforcement of the English High Court judgment in the BVI.

Firstly, the judgment will need to be recognised under the Reciprocal Enforcement of Judgments Act 1922 (**Act**). The Act is engaged because the judgment is from the English High Court<sup>15</sup>. As the judgment is a final judgment following a hearing and is for a sum of money, the judgment is likely to qualify as a "judgment" for the purposes of the Act<sup>16</sup>.

The relevant time period in which a judgment must be recognised under the Act is 12 months from the date of judgment, unless the BVI Court grants a longer period on the basis that it is just and convenient to do so<sup>17</sup>. The date of the English judgment is not known, and if it is beyond the 12 month registerable period, Pinforth Holdings will need to seek an extension and be in a position to argue what it is just and convenient for the extension to be granted.

In terms of procedure, the application is made pursuant to CPR Part 72<sup>18</sup>. The application must contain certain prescribed information and must exhibit a duly authenticated copy of the judgment and details of any interest that has become due under the law of England and Wales. The application can be made without notice to EP. Pinforth Holdings may be ordered to provide security for costs in relation to any proceedings that EP bring to set aside the registration.

As to the approach that the BVI Court will take in determining the application for registration, section 3(2) of the Act provides that the Court will not order a judgment to be registered in the event that:

- a. the original court acted without jurisdiction;
- b. the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction;
- c. the judgment debtor was not duly served with the process original court and did not appear, notwithstanding that he is ordinarily resident or carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of the court;
- d. the judgment was obtained by fraud;
- e. the judgment debtor satisfies the court that an appeal is pending or that he is entitled to and intends to appeal; or
- f. the judgment related to a cause of action which for reasons of public policy (or similar) could not have been entertained by the Court.

If any of the above applies, the BVI Court will not recognise Pinforth Holding's judgment. From the limited facts available, it is not possible to conclude whether many of the factors above could apply. For example, it is not known if the judgment was obtained by fraud. The facts do mention that EP did not attend the hearing which could potentially negate the judgment being

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<sup>15</sup> The Act, section 3(1)

<sup>16</sup> section 2(1) "Judgment" is defined as any judgment or order given or made by a court in any civil proceedings, whether before or after the passing of the Act, whereby any sum of money is payable.

<sup>17</sup> *Idem* section 3(1)

<sup>18</sup> *Ibid*

recognised on the basis of ground c. above. However, if Pinforth Holdings can establish that service of the proceedings and notice of the hearing on EP was valid and proper, it is likely to be deemed to have had notice of the hearing. In this case ground c., is unlikely to be a reason to dismiss the recognition application

If the judgment is recognised under the Act, it is treated from the date of registration as being of the same force and effect as if the judgment had been made in the BVI<sup>19</sup>. From this point, all the remedies available under the CPR for enforcement are at Pinforth Holding's disposal. Pursuant to CPR 45.2 such remedies include: (i) a charging order; (ii) a garnishee order; (iii) judgment summons; (iv) an order for seizure and sale of goods; (v) the appointment of a receiver. What remedy or combination of remedies might best be deployed will depend on the type of assets EP holds, and how effectively and efficiently they can be liquidated to satisfy the judgment.

#### 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?

It is not known whether the loan from Abbeydale Limited (AL) to Dendoncker Limited (DL) was secured. If there was security in place, AL can enforce its security over the relevant asset for the value of the total debt owed and in accordance with whichever law the security instrument is governed by. Any appointment of a liquidator as part of an insolvency procedure commenced by any third party will not affect AL's right to take possession or realise or otherwise deal with the assets over which AL has security<sup>20</sup>. If there is security for a certain amount which is less than the total amount of DL's indebtedness, AL can seek recovery as an unsecured creditor for the balance in any formal insolvency proceedings it / any other creditor commences<sup>21</sup>.

Assuming there is no security in place, or, even if there is but AL wishes to claim in a liquidation as an unsecured creditor for the whole of its debt; upon failing to meet AL's demand for immediate repayment, DL is in breach of the loan agreement and indebted to AL the full amount of the loan, and AL is an unsecured creditor of DL. In the absence of a qualifying resolution from the members of DL, AL can apply to commence formal insolvency proceedings under the provisions of Part VIII of the IA and appoint a liquidator.

AL will need to be in a position to satisfy the Court of DL's insolvency. This may be done by way reference to one of the statutory tests of insolvency. AL can apply to appoint a liquidator

<sup>19</sup> The Act, section 3(3)(a)

<sup>20</sup> IA, section 175(2)

<sup>21</sup> *Idem*, section 211

**Commented [JW11]:** 7 marks - first issue is A secured or unsecured creditor? If secured - is there registered charge/debenture/legal charge/equitable charge. Options under IA2003: Receiver /Administrative Receiver / Out of Court Receiver.

**Commented [JW12]:** This needed to be expanded upon with the options under the IA2003 given.

**Commented [JW13]:** How would A know?

by establishing that DL is unable to pay its debts as they fall due<sup>22</sup> (the debt under the loan being payable and outstanding). Alternatively insolvency can be established, if AL can show that DL's liabilities exceeds the value of its assets<sup>23</sup>. The latter may be difficult from a practical perspective because it may not be possible to have access to DL's financial statements and information in order to make out this case in evidence. A more straightforward third option would be to issue a statutory demand under sections 156 and 157 of the IA. This is a written demand for payment of a debt that is due and payable, in the format required under section 156. AL will need to sign and date the demand. It must require DL to satisfy the demand within 21 days of service. It would be advisable to ensure service is effective using the prescribed method of service on a BVI company under the relevant rules. Proof of service would also be advisable. Unless DL applies to set aside the statutory demand (most commonly on the basis that the debt is disputed) within 14 days and the 21 day period for payment from service of the statutory demand passes, the default operates as a presumption of DL's insolvency. Although, this option is perhaps the most straightforward to evidence insolvency, there is a risk that service of a statutory demand could result in DL anticipating the impending insolvency proceedings and taking steps to put assets beyond AL's reach. Therefore, the first test of insolvency of being unable to pay debts as they become due might be the preferred basis upon which to bring the application to appoint a liquidator. Of course, there are ways in which once holding office, a liquidator can claw-back assets paid away DL, were this to happen, using the statutory actions for voidable transactions as set out in section 244(1) of the IA.

Assuming that one of the tests of insolvency can be satisfied, AL can then issue an application under section 162 of the IA as supplemented by the Insolvency Rules, for a liquidator to be appointed. The BVI Court is tasked with determining an application for the appointment of a liquidator within 6 months after it is filed<sup>24</sup>, unless the Court extends this timeframe (such an extension will be limited to three months and only if there are special circumstances justifying the extension). If the Court is satisfied that DL is insolvent, it may appoint a liquidator pursuant to section 159(1) of the IA.

If there are any concerns about DL disposing or otherwise conducting business in such a way as to jeopardise value in and realisation of its assets, the Court can appoint the Official Receiver or an eligible insolvency practitioner as a provisional liquidator under section 170 of the IA. This provision can be utilised if there is a risk of dissipation of assets or DL will not properly maintain its business between the filing of the application to appoint a liquidator and its determination. Aside from consent of DL or it being in the public interest, the Court will make such an order only if satisfied that it is necessary for the purpose of maintaining the value of assets owned or managed by DL<sup>25</sup>. In order to make a successful application to appoint a provisional liquidator pursuant to section 170, AL will need to demonstrate that: (a) there is an application before the court for the appointment of a liquidator; (b) there is a good arguable case that a ground for the appointment of a provisional liquidator exists; (c) there is a good arguable case that AL has standing to make the application; and (d) the Court should exercise its discretion to maintain the status quo in relation to DL's assets<sup>26</sup>.

The rights and duties a provisional liquidator has are the same as a liquidator only to the extent necessary to maintain the value of the assets owned or managed by DL or to carry out specific functions in accordance with the appointment. The Court can limit the powers of a provisional

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<sup>22</sup> IA, section 8(1)(c)(ii)

<sup>23</sup> *Idem*, section 8(1)(c)(i)

<sup>24</sup> *Idem*, section 168(1)

<sup>25</sup> *Idem*, section 170(4)

<sup>26</sup> See *Akai Holdings Limited v Brinlow Investments Limited* BVIHC 134 of 2006.

liquidator if it deems fit<sup>27</sup>. The provisional liquidator's appointment will end when the Court makes an order for the appointment of a liquidator<sup>28</sup> or terminating the provisional liquidation.

Once a liquidator is appointed, he has custody and control of DL's assets and the power to sell them. The liquidator's principal duties as set out in section 185(1) of the IA will be to take possession of, protect and realise the assets of DL, to distribute the assets of the proceeds of realisation of the assets in accordance with the IA; and if any surplus assets or proceeds of realisation, to distribute them in accordance with the IA.

AL will be able to prove in the liquidation by submitting a written claim, signed by AL or on its behalf. The Insolvency Rules, r.184 sets out the details of what a claim should include. The liquidator may be required to verify its claim by affidavit; provide further particulars of its claim; or provide the liquidator with documentary or other evidence to substantiate the claim. This claims process is the same whether AL applies to appoint a liquidator or is an unsecured creditor submitting a claim in proceedings in which AL was not the applicant creditor.

If AL's claim is accepted by the liquidator it will share in the distribution of the proceeds of realisation of DL's assets. However, the assets and proceeds of realisations are paid in an order of priority and unsecured creditors like AL will only be paid after payment of the costs and expenses properly incurred in the liquidation in accordance with the prescribed priority; and b. payment of preferential claims (such as outstanding salary owed to employees or taxes due to the BVI government). After preferential claims, AL and other unsecured creditors whose claims have been admitted, will share in the available funds for distribution and the claims of the unsecured creditors will rank *pari passu*<sup>29</sup>. This will enable AL to recover its debt to the extent that there are available assets which facilitate this process.

**\* End of Assessment \***

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<sup>27</sup> IA, Section 171

<sup>28</sup> *Idem*, section 1739(2)

<sup>29</sup> *Idem*, section 207(2)