



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]: 9 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.

Commented [JW2]: Correct answer

Commented [JW3]: Incorrect answer

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.

In order to appoint a voluntary liquidator over a company under the BVI Business Company Act (the **BCA**), the company must be solvent. That is, the company must be shown to have no liabilities and is able to pay its debts as they fall due and the value of its assets is equal to or exceeds its liabilities. Voluntary liquidation is therefore generally used where the company is no longer required by a business and it is agreed to be dissolved. The main purpose of a voluntary liquidation is therefore to deal with the company's assets and liabilities, if there are any, in order to liquidate the solvent company. The company can be voluntarily liquidated notwithstanding a security interest is registered with the Registrar. However, a voluntary liquidator cannot be appointed where a liquidator of the company has already been appointed under the Insolvency Act.

Under Part XII of the BCA, in order to appoint a voluntary liquidators the directors of the company must (i) make a declaration of solvency and (ii) approve a liquidation plan. The liquidation plan must be approved by the directors no more than 6 weeks before the date on which a resolution is passed appointing a liquidator. Additionally, where the directors make a declaration of solvency without having reasonable grounds for believing the company is solvent (that is, the company will continue to be, able to discharge, pay or provide for its debts in full as they fall due), they commit an offence and will be liable on summary conviction for a fine of US \$10,000.

The person appointed as the voluntary liquidator need not be a licenced insolvency practitioner unless the company is regulated, however, the individual must not have been disqualified from being appointed as a or acting as a voluntary liquidator.

Question 2.2 [maximum 2 marks]

A liquidator is appointed to a BVI incorporated company by the Court. In what circumstances would an officer of that company be deemed to have committed an offence pursuant to the fraudulent conduct provisions? You are required to make reference to the relevant legislation.

Pursuant to section 289 of the BVI Insolvency Act, where a liquidator is appointed by the Court, anyone who is or has been an officer of the company is deemed to have committed an offence if, any time whilst being an officer or during the period of 12 months preceding the commencement of the liquidation, he/she has

(a) made or caused to be made any gift or transfer of, or charge on, or has caused, permitted or acquiesced in 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, the officer (or former officer) will not be found guilty of a fraudulent conduct where

(a) The conduct constituting the offence (in relation to a gift etc) occurred more than five years before the commencement of the liquidation; or

Commented [JW4]: 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 [JW5]: 2 marks

(b) he/she can prove that at the time of the conduct constituting the offence, he/she had no intention to defraud the company's creditors.

Question 2.3 [maximum 2 marks]

Commented [JW6]: 2 marks

With reference to the Insolvency Act, what powers are provided to the BVI Court in relation to the orders the Court can make in support of foreign insolvency proceedings?

Part XIX of the Insolvency Act provides the framework for the BVI Court to make orders in support of foreign insolvency proceedings on a case by case basis. Under the Act, the court may:

- (a) Recognise the foreign insolvency proceedings in designated countries (such as the United Kingdom, USA and Canada) and provide assistance to the foreign representative;
- (b) Restrain the commencement or continuation of any proceedings against the debtor or debtor's property;
- (c) Restraining the creation, exercise or enforcement of any right or remedy over or against the debtor's property;
- (d) Require any person to deliver up any property of the debt or the proceeds of such property;
- (e) Order or grant relief to facilitate, approve or implement arrangements that will result in a co-ordination of the BVI insolvency proceeding with the foreign proceeding;
- (f) Appoint an interim receiver of any property of the debtor for such term and subject to such conditions the court thinks appropriate; or
- (g) Stay or terminate or make any other order the court considers appropriate in relation to any BVI insolvency proceeding.

When exercising these powers the court will aim to ensure the economic and expeditious administration of the foreign insolvency proceeding.

There are other provisions under the Insolvency Act (Part XVII) which models the UNCITRAL Model Law on Cross-Border Insolvency, but the court is not able to apply those provisions as these provisions have not been brought into force as yet.

Question 2.4 [maximum 4 marks]

Commented [JW7]: 3.5 marks

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

In the BVI, a company will be considered insolvent under the following circumstances:

- (a) Where it is proved to the satisfaction of the BVI Court that the company is unable to pay its debts as they fall due (ss. 210(1) and 211A). This is a question of fact. It is a settled principle that where a company is unable to pay a debt that is due and the debt is not disputed then this would be a sufficient basis on which the court can find that the company is insolvent (see the English case of *Cornhill Insurance v Improvement Services Ltd*);
- (b) Where the company is balance sheet insolvent, that is, where it is proved to the satisfaction of the Court that the value of the company's liabilities have exceeded the value of its assets. The court may consider a wide range of liabilities based on the

Commented [JW8]: Section 8 IA 2003

wide definition provided by section 10(1) of the Insolvency Act. Liabilities may arise, for example, under an enactment, in a contract, by tort or bailment, a breach of trust or an obligation to make restitution. Liabilities may be present, future, certain, contingent, fixed, liquidated, sounding only in damages or capable of being ascertained by fixed rules or opinion. It has been held in the BVI however, that a company will not be considered balance sheet insolvent where the value of its assets are lower than the value of its liabilities for a short period;

- (c) Where the company fails to satisfy execution or other process issued on any judgment, decree or order of the Court in the BVI favour of a creditor of the company. The failure may be in whole or part; and
- (d) Where the company fails to comply with a statutory demand (generally payment of the debt or secure or compound the debt within the reasonable satisfaction of the creditor within 21 days of service of the statutory demand), and the statutory demand has not been set aside under ss. 156 and 157 of the Insolvency Act. Any application to set aside a statutory demand must be made within 14 days of service.

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.

Pursuant to Section 234(2) of the Insolvency Act, one of the steps a liquidator must take when preparing to terminate a liquidation is to prepare his or her final report as soon as practicable after completing his duties.

The report will need to be sent to every creditor of the company whose claim has been admitted as well as to every member of the company. The report must also be sent along with a statement of realisations and distributions in respect of the liquidation and a summary of the grounds upon which a creditor or member may object to the striking of the company from the BVI Register (s.234(2)).

The liquidator must also file a copy of the final report and the statement of realisations and distributions sent to the creditors and members of the company with the Registrar.

In preparing the final report, the liquidator must ensure that the report contains a statement (a) that all known assets of the company have been disclaimed, realised or distributed or without realisation (b) that all proceeds of realisation have been distributed and (c) that there is no reason why, in his or her opinion, the company should not be struck from the Register, and dissolved (section 234(3)).

The liquidator may also consider making an application to the court for an exemption from the obligation to send his or her final report to all known creditors and members. He may also apply to modify the requirements of section 234(2) i.e. sending the reporting to all admitted creditors, members and the registrar.

Commented [JW9]: 3 marks - no mention of BCA 2004 sections 207A-208 for voluntary liquidation. Termination does not always mean company is struck off or dissolved.

The liquidator will also need to apply for a release when his or her appointment ends under section 235 of the Insolvency Act to ensure that he or she is discharged from all liability in respect of any act or default in relation to his administration of the company.

Question 3.2 [maximum 5 marks]

Commented [JW10]: 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?

Under 483 of the BVI Insolvency Act, an application may be made to the BVI court for the appointment of an overseas insolvency practitioner to act as the liquidator of a BVI incorporated company as a joint appointee with another BVI licensed insolvency practitioner.

Prior to the appointment of the overseas practitioner, written notice of the intended appointment must be served on the Financial Services Commission. The Commission may thereafter give notice to the appointor that it intends to apply to the court for an order that the overseas insolvency practitioner should not be appointed. The Commission may appear and be heard at the hearing of the application for the purpose of objecting to the appointment.

Given the nature of BVI companies, creditors may consider it useful to appoint an overseas insolvency practitioner, jointly with a locally licenced practitioner. BVI companies are often international holding companies or part of a global group of companies whereby the operational companies are based in other jurisdictions. The creditors may therefore wish to appoint a foreign insolvency practitioner in the jurisdiction or jurisdictions where the assets of those operational companies are held as it significantly reduces costs and will be more efficient.

The BVI Court will only appoint the overseas insolvency practitioner if it is satisfied that:

- (i) He or she has sufficient qualifications and experience to act in the insolvency proceeding in respect of which the appointment is made;
- (ii) He or she has given his or her written consent to act in the prescribed form;
- (iii) He or she is not disqualified from holding a licence under section 477 of the Insolvency Act;
- (iv) He or she is not disqualified from acting in the case of a company or a foreign company under section 482(2) of the Insolvency Act; and
- (v) There is in force such security for the proper performance of his or her functions as may be specified in the Insolvency Regulations.

Question 3.3 [maximum 5 marks]

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

There are several protections and options provided to secured creditors under the BVI insolvency law.

Firstly, a secured creditor has an enforceable security interest over an asset of the debtor in respect of his claim. The appointment of a liquidator over the company does not affect the right of a secured creditor to take possession, realise, or otherwise deal with assets over which the creditor has security (section 175(2)). The liquidator is bound to give effect to the rights of priority of the claim of a secured creditor and that a liquidation does not affect the right of a secured creditor to take possession or realise or otherwise deal with the assets over which the creditor has security. Also, where there is a discharge of bankruptcy proceedings, that discharge will not affect the rights of any creditor to enforce his or her security interest.

Secured creditors may remain outside the liquidation process as their claims are directly against the assets of the company which is subject to the security. Therefore, there is no timeline for enforcing a secured claim and it is up to the secured creditor to determine when to take control of the security interest and when to sell it for the best return.

Unless the secured creditors agree in writing to the contrary, a company's creditors' arrangement will not affect the right of a secured creditor to enforce its security interest or vary the liability secured by the security interest.

Additionally, Orders made by the Court in aid of foreign proceedings under section 467 of the BVI Insolvency Act will not affect the rights of a secured creditor to deal with the property over which they have an interest.

Secured creditors have the option of making an application for bankruptcy order which entails stating that they are willing to give up their security interest for the benefit of other creditors of the bankrupt or give an estimate of the value of their security interest as make an application in respect of the full amount of the liability of the debtor to them less the estimated value of the security interest.

Some right and options may depend on the security held by the creditor. For example, where the creditor's security is by way of a legal mortgage, in the event of default under the mortgage or charge, the secured creditor may (i) foreclose on the charged shares, (ii) sell the shares, or (iii) appoint a receiver over the shares so as to enforce or realise its security. Where the security is by way of a pledge, the secured creditor will have a power of sale over the assets which have been pledged and he or she may sell the assets in the event of a default.

A secured creditor also has the option to value the assets subject to the security and claim in the bankruptcy as an unsecured creditor for the balance of his debt or surrender his security interest to the trustee for the general benefit of creditors and claim in the bankruptcy as an unsecured creditor for the whole of his debt. There is however, no obligation for a secured creditor to do so. The secured creditor may at any time apply to the liquidator to amend the value that he placed on the security interest in his claim.

Commented [JW11]: 4 marks - Protection also in liquidation/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

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

Question 4.1 [maximum 6 marks]

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

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

The Reciprocal Enforcement of Judgments Act 1922 allows for the recognition/registration of the English High court judgment against Expat Properties in the BVI as a judgment of the Territory. This is because the Act extends to final monetary judgments of the High Court of England and Wales. Once the judgment is registered in the BVI, the judgment creditor may enforce the judgment in the BVI against assets of the judgment creditor. Pinforth Holdings should therefore consider registering the English judgment in the BVI, so as to take steps in the BVI to enforce the English judgment against the assets of Expat Properties in the BVI.

The English proceedings commenced in September 2020, but it is unclear when the judgment against Expat Properties was issued by the English High Court. If Pinforth wants to register the judgment in the BVI, it is best to ensure that an application to register the judgment is lodged in the BVI court within 12 months of the date of the English judgment. Otherwise, Pinforth will need to seek permission from the BVI court for an extension of time within which to file the registration application, and would need to prove to the court that it is just and convenient for an extension to be granted. The date of judgment will therefore be an important consideration for Pinforth.

Pinforth would also need to satisfy the BVI court that the English High Court acted with appropriate jurisdiction over its claim against Expat Properties. Generally, the English High Court has a broad jurisdiction to hear claims, and so this may not be a significant hurdle.

Expat Properties did not appear at the hearing at which judgment was determined in favour of Pinforth. Pinforth would therefore need to show evidence that the English proceedings were duly served on Expat Properties, who did not appear at the hearing.

Since Expat Properties, is a company which was neither carries on business in nor is ordinarily resident in England and Wales, Pinforth would further need to show that Expat Properties submitted or agreed to submit to the jurisdiction of the court. This may be, for example, contained in the provision of a contractual document which forms the basis of the English claim.

The judgment must also not have been obtained by fraud and must not be a judgment against the public policy of the BVI or for some other reason could not have been entertained by the BVI Court.

The court will also not register the judgment if Expat Properties has a pending appeal. The court will similarly not register the judgment if Expat is entitled to appeal and intends to appeal.

Where the BVI court is satisfied that all the above requirements are met, it will register the judgment. It will also specify a period within which Expat Properties may challenge the registration. Upon the expiration of that period, Pinforth may enforce the registered judgment

Commented [JW12]: 5 marks - As Expat did not attend hearing so likely not registrable but in common law remedy under doctrine of obligation action as specified sum or summary judgment then liquidation under section 162 IA2003

as any ordinary BVI judgment, including by attachment of debts, a charging order, a judgment summons, an order for seizure and sale of goods and the appointment of a receiver. The method of enforcement will depend on the types/nature of assets owned by Expat Properties in the BVI.

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?

Abbeydale Limited should first consider issuing a written statutory demand for repayment of the loan in full. The statutory demand would be issued pursuant to section 156 of the Insolvency Act. The statutory demand must require the full repayment of the loan plus in full together with any interest that is due under the agreement. It would also require payment of this sum within 21 days of service of the statutory demand. While a statutory demand is not a precondition to lodging a winding up application, it is generally recommended. This is because, the failure to satisfy a statutory demand would go towards proving that Dendoncker is insolvent (prima facie evidence) as it is unable to pay its debts as they fall due and has failed to comply with the terms of the statutory demand (provided it has not been successfully set aside under sections 156 and 157 of the Insolvency Act). It also puts pressure on the Dendoncker with the threat of liquidation proceedings and if the debt under the agreement is not repaid or the statutory demand is not set aside.

Where Dendoncker failed to satisfy the statutory demand (and the statutory demand has not been set aside) Abbeydale, as a creditor of Dendoncker may file an application in the BVI Court for the appointment of a liquidator over Dendoncker Limited (section 162 of the Insolvency Act). In accordance with section 159(1) of the Insolvency Act, the Court may only appoint a liquidator over a company if the company is insolvent, or where the court is of the opinion that it is just and equitable to do so, or where it is in the public interest to do so.

Dendoncker will be considered insolvent, where, amongst other things, it is proved to the satisfaction of the court that Dendoncker is unable to pay its debts as they fall due. This is a question of fact. It is a settled principle that where a company is unable to pay a debt that is due and the debt is not disputed then this would be a sufficient basis on which the court can find that the company is insolvent (see the English case of *Cornhill Insurance v Improvement Services Ltd*). Therefore, where it is not disputed that a debt is owed by Dendoncker in terms of it owing the full loan amount of \$12,000,000 plus interest to Abbeydale, a BVI may be persuaded to find that the company is insolvent.

Commented [JW13]: 5 marks - First issue to determine: 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.

The court may also find that Dendoncker is balance sheet insolvent, that is, where it is proved to the satisfaction of the Court that the value of the company's liabilities have exceeded the value of its assets. The court may consider a wide range of liabilities based on the wide definition provided by section 10(1) of the Insolvency Act. Liabilities may arise, for example, under an enactment, in a contract, by tort or bailment, a breach of trust or an obligation to make restitution. Liabilities may be present, future, certain, contingent, fixed, liquidated, sounding only in damages or capable of being ascertained by fixed rules or opinion. Abbeydale must therefore consider whether it can obtain evidence of balance sheet insolvency of Dendoncker.

Prior to lodging the application for liquidators, Abbeydale should also need to identify an eligible insolvency practitioner to act as liquidator. It is generally recommended to appoint joint liquidators. Abbeydale would need to obtain their written consent to act, and approval from the Financial Services Commission for their appointment as liquidators over Dendoncker.

Abbeydale may also consider whether it would like interim relief pending the determination of the application to appoint a liquidator. This could be, for example, the appointment of a provisional liquidator over Dendoncker. The provisional liquidator could be used to in circumstances where there is a risk of dissipation of assets by Dendoncker or where the company's business will not be properly maintained between the filing of the application for appointment of liquidators and its determination.

Upon determination of the application to appoint liquidators, the liquidators will then take control of, protect and realise the assets of the company. The liquidators will give notice of their appointment and call a first meeting of the creditors within 21 days of their appointment. The liquidators will thereafter admit claims and Abbeydale will be able to submit its claim to the liquidators during this process.

Where Abbeydale has a security interest in the Necker Island property, it would also need to consider its rights of a secured creditor. In particular, Abbeydale, as a creditors may remain outside the liquidation process as its claim would directly against the assets of the company (the Necker property) which is subject to the security. Therefore, it may decide when to take control of the security interest and when to sell it for the best return.

*** End of Assessment ***