



**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.

Commented [JW2]: Incorrect answer

Commented [JW3]: Correct answer

#### 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.

Section 197(1) under Part XII of the BVI Business Companies Act 2004 (*BCA*) provides that a company may liquidated voluntarily only if:

- (a) it has no liabilities; or
- (b) it is able to pay its debts as they fall due and the value of its assets equals or exceeds its liabilities.

It must also be noted that a solvency statement confirming the solvency of the company will have to be provided by the directors along with an approval of the liquidation plan for the company which would, among other things, provide the reasons for liquidating the company.

**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.

Under Section 289 of the BVI Insolvency Act 2003 (*IA 2003*), an officer of the company is deemed to have committed an offence if, at any time while he was an officer of the company or during the period of 12 months preceding the commencement of the liquidation, where a liquidator is appointed to the company (under section 159 of IA 2003), 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, it must be noted that such person will not be held guilty under this section 289 if he/she proves that he had no intention to defraud at the time of conducting the offence. Also, if the offence contemplated under Section 289(1)(a) (as above) occurred more than five years before the commencement of the liquidation, then such person will not be liable.

**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 2003 provides for the co-operation of the BVI Court with foreign representatives in the form of making orders in aid of foreign proceedings. Section 468(3) of the IA 2003 sets out a non-exhaustive/ indicative list of orders that can be made by the BVI Court in aid of foreign proceedings which are as follows:

- '(a) restrain the commencement or continuation of any proceedings, execution or other legal process or the levying of any distress against a debtor or in relation to any of the debtor's property;*
- (b) subject to subsection [468](4), restrain the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property;*

**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

**Commented [JW6]:** 2 marks

- (c) require any person to deliver up to the foreign representative any property of the debtor or the proceeds of such property;
- (d) make such order or grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a coordination of a Virgin Islands insolvency proceeding with a foreign proceeding;
- (e) appoint an interim receiver of any property of the debtor for such term and subject to such conditions as it considers appropriate;
- (f) authorize the examination by the foreign representative of the debtor or of any person who could be examined in a Virgin Islands insolvency proceeding in respect of a debtor;
- (g) stay or terminate or make any other order it considers appropriate in relation to a Virgin Islands insolvency proceeding; or
- (h) make such order or grant such other relief as it considers appropriate.'

However, it must be noted that there is an express qualification under this part that assistance cannot be rendered in such a way as to interfere with the rights of a secured creditor under their security i.e. it should not affect the rights of the secured creditors (Section 468(4)). The BVI Court may apply the law of the Virgin Islands or the law of the foreign proceedings to make the orders set out above (Section 468(5)).

While Part XVIII of the IA 2003, adopts the UNCITRAL Model Law on Cross-Border Insolvency, it has not been brought into force yet in BVI so this part may not be relied upon in relation to understanding powers of the BVI court.

**Question 2.4 [maximum 4 marks]**

Commented [JW7]: 4 marks

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

In summary, under BVI law a company will be deemed to be insolvent if it is (1) cash-flow insolvent, (2) balance sheet insolvent or (3) 'technically' insolvent (i.e. it has failed to satisfy a judgment debt or a statutory demand).

Section 8(1) of the IA 2003, provides that a company is insolvent if it:

- (a) fails to satisfy the requirements under a valid statutory demand (SD)  
An SD is a written demand for payment of a debt that is due and payable made by a creditor under Section 156 of the IA 2003. An SD must be satisfied within 21 days from the date of service of the same on the debtor company. The debtor company may apply to set aside the SD within 14 days from the date of service of the SD. Upon such application, the Court may set aside the SD, on the basis of, among other things, a substantial dispute over the part/ whole of the debt, potential set-off/ counter claim against the creditor, value of the security interest held by the creditor is equivalent/ exceeds the debt claim (Section 157(1)) or a defective SD (Section 157(2)). If the SD is not successfully set aside under Sections 156-157 of IA 2003, the company will be deemed insolvent.
- (b) fails to satisfy a judgement, decree or order of the BVI Court granted in favour of a creditor of such company, in whole or in part;
- (c) if it either
  - (i) balance sheet insolvent i.e. it is proved to the satisfaction of the court that the company's liabilities exceed its assets. Section 10 of the IA 2003 provides a very definition of liability and includes a debt and which maybe, among other things, 'present or future, certain or contingent, fixed or liquidated' (Section

10(2)). However, The BVI Court of Appeal clarified and confirmed in its decision in *Trade and Commerce Bank v Island Point Properties*<sup>1</sup> that a company, may not be considered balance sheet insolvent where value of the company's assets became lower than its liabilities only for a short period of time.

or

- (ii) cash flow insolvent i.e. the company is unable to pay its debts as they fall due. This is usually a question of fact and if the debtor's inability to pay debts is proved to the satisfaction of the court, it is sufficient evidence of insolvency.

Insolvency on any of these grounds will enable a creditor to petition the BVI court for the appointment of a liquidator, and may also have other consequences, for example, when a company is insolvent, directors owe their primary duties to the company's creditors.

### 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.

[All references to sections refer to provisions from the IA 2003, unless otherwise specified]

#### Applicant for termination:

Pursuant to Section 233(2) of the IA 2003, a 'liquidator, a creditor, a director or member of the company or the Official Receiver' may make an application to the Court for termination of liquidation of the company.

#### Instances for termination:

Section 232 of the IA 2003 provides the following instances for termination of liquidation:

- (a) the making of a Court order terminating the liquidation (under section 233)

The Court may make an order for termination of liquidation on an application under section 233(2) above if it is satisfied that it is just and equitable to do so. (section 233(1)). An order may be made subject to such terms and conditions as the Court considers appropriate and, supplemental directions may also be made in connection with the termination of the liquidation. (Section 233(4)). A later date for termination to occur may be specified in the Court order;

- (b) the liquidator filing a certificate of compliance (as per section 234(2)), as modified by the Court under section 234(4), if appropriate; or

- (c) the making of a Court order (under section 234(4)) exempting the liquidator from filing a certificate of compliance.

#### Effect of termination:

Where the Court makes an order for termination of liquidation, the company ceases to be in liquidation and the liquidator ceases to hold office with effect from the date of the order or such later date as may be specified in the order (Section 233(5)). The person who applied

<sup>1</sup> BVICAP 2009/12

**Commented [JW8]:** 3 marks - no mention of BCA 2004 sections 207A-208 for voluntary liquidation. Termination does not always mean company is struck off or dissolved.



for the order shall, (in this case the liquidator) will have to, within ten (10) days of the date of the order, file a sealed copy of the order with the Registrar of Companies (or international business companies as the case may be) in BVI (**Registrar**).

Steps to be taken by the Liquidator for completion of liquidation:

As per section 234(2), as soon as practicable after completing the liquidation of a company, the liquidator shall:

(a) prepare and send to every creditor (who has an admitted claim) and member of the company:

(i) the final liquidator's report, and a statement of realisations and distributions in relation to the liquidation, and

(ii) a summary of the grounds upon which a creditor or member may object to the striking of the company from the Register; and

(b) file a copy the abovementioned final report and the statement of realisations and distributions which was sent to the creditors and members of the company with the Registrar.

Section 234(3) provides that the final report of a liquidator shall contain, among other things, a statement

(a) that all known assets of the company have been disclaimed, realised or distributed without realisation;

(b) that all proceeds of realisation have been distributed; and

(c) that there is no reason why, in his opinion, the company should not be struck from the Register, and dissolved.

Release:

Section 235 allows the liquidator/ provisional liquidator to be released upon the termination of liquidation and once their appointment ends. The effect of such release is that the liquidator is discharged from all liability in respect of any act or default in relation to the administration of the company.

Usually, the company is dissolved after termination except for situations where the debt has been paid by the company to the relevant creditor and the company is allowed to operate like before.

### **Question 3.2 [maximum 5 marks]**

Commented [JW9]: 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?

Section 483 of the IA 2003 provides that a person resident outside of the BVI can be appointed to act as an insolvency practitioner jointly with a licensee or the official receiver of the company.

(ii)

Process for appointment:

The Court will have to be satisfied that certain requirements under this section 483 are met prior to making an application for appointment of such foreign insolvency office holder, which are as follows<sup>2</sup>:

The foreign insolvency office holder should:

<sup>2</sup> Section 483(a) of the IA 2003

- (i) have sufficient qualifications and experience to act in an insolvency proceeding.
- (ii) given his/her written consent to act in the prescribed form (usually referred to as 'Consent to Act' form,
- (iii) not be disqualified from holding a licence under section 477 of the IA 2003,
- (iv) not be disqualified from acting in the case of a company or a foreign company, under section 482(2) or in the case of an individual, under section 482(3),
- (v) be in force such security for the proper performance of his functions as may be specified in the relevant regulations.

In addition, a prior written notice of his appointment should also be given to the Financial Services Commission in BVI<sup>3</sup>.

(i)  
Circumstances for appointment:

Usually, many of the BVI companies' business operations, assets or a substantial part of their assets and properties are located in jurisdictions outside of the BVI. Often the creditors are also domiciled in other jurisdictions, sometimes closer to where the principal place of business of the company is. It is beneficial in such instances to appoint an insolvency practitioner from the jurisdictions where substantial assets are located.

As foreign insolvency practitioners are appointed alongside BVI practitioners, it may seem to be expensive to appoint 2/more insolvency officers. However, the local expertise of the foreign insolvency holders where assets are located, together with saving of costs of travel to such jurisdiction should a BVI insolvency officer be appointed, provide more practical advantages to have foreign practitioners in such jurisdictions.

**Question 3.3 [maximum 5 marks]**

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

Under the BVI law, there are several forms of security interests that can be created such as legal and equitable mortgage, equitable charge (fixed or floating), pledge, legal and equitable lien, hypothecation etc.

Section 161(1) of the BCA provides that a BVI Company may create a charge (defined as '*any form of security interest*') over its properties by an instrument in writing (subject to the memorandum and articles of association of the company). Specifically for immovable properties, common forms of securities are mortgages and charges and if a charge related to a land, it should be registered with the land registry in BVI. Section 162 of the BCA also makes it mandatory for a company to keep a register of all relevant charges at the company's registered office.

In terms of protections and enforcement options in relation to above mentioned security, below are the primary remedies available:

1. Foreclosure:

This remedy is available for legal mortgages (and equitable mortgages if the mortgagee and is one of the most severe forms of remedies as it essentially leaves the asset to be legally and beneficially owned by the secured creditor. Obtaining an order to foreclose from the BVI court would be a relevantly long process as first, an order nisi is granted before an absolute order. Usually, given the draconian nature of

<sup>3</sup> Section 483(b) of the IA 2003

**Commented [JW10]:** 1 mark - question states BVI Insolvency framework - the BCA 2004 is not under the insolvency framework. Protection in IA2003 - in liquidation 175 /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

this remedy, the court may order judicial sale as an alternative to an application to foreclose.

2. Power of Sale:

This is a common remedy and allows the secured creditor to sell the collateral. This would be a classic case when Banks are trying to exercise their rights over a secured immovable property. However, if the secured property is shares of the company, finding buyers (especially in a depressed market) may be challenging. While there is usually an implied power of sale that exists in respect of mortgages and charges, there is a further power of sale implied by section 66(5)(a) of the BCA. However, a well drafted security document will also invariably include an express contractual power of sale, and it is the contractual power of sale which is the normal basis of exercise.

Technically, the secured creditors may not even require to apply to the Court for exercising this right. Practically, the creditors may think it beneficial to apply to the court to ensure that they are overlooked for obtaining the reasonably best price and in cases where the property is shares, the creditors may bid for the purchase of the shares themselves. Credit bidding is also common when it comes to this form of remedy.

3. Appointment of receiver:

This is one of the most common methods of security enforcement. This power is also limited to holders of a mortgage or charge and is not available to arrangements such as Pledges. Usually, this rights arises from a contractual arrangement or a security document between the charger and chargee, however, the secured creditors may also exercise this rights under statute i.e. under the BVI Conveyancing and Law of Property Act 1961 (where the mortgage instrument is executed as a deed) and under section 66(5)(b) of the BCA (where the mortgage or charge is governed by BVI law).

The receiver is usually appointed out of court pursuant to the terms of the security document and does not need a court order, but must be made in writing.

The usual course of action upon the receiver's appointment is voting the shares, sell the shares and receive any dividends or redemption proceeds. Where the company is an asset holding vehicle, the usual practice is to appoint a receiver, and the receiver then exercises the votes attached to the shares to replace the board of directors (usually putting a nominee corporate director in place), and the new director can then market and hopefully sell the underlying assets of the company and distribute the proceeds by dividends.

4. Possession:

This is a remedy conferred by way of mortgage. While a perfected legal mortgagee will technically be in possession i.e. in respect of shares, being the registered holder, an equitable mortgagee is also entitled at any time to be registered as the holder of the shares either on a default or even in anticipation of a default.

5. Other foreign law remedies:

Section 161(2) of the BCA provides that governing law of the charges may be agreed between the parties to be a foreign law. Accordingly, the remedies available to the mortgagee will be determined by that foreign law. For instance, in the case of *Alfa Telecom Turkey Limited v Cukurova International Finance Limited*, an attempt was made to use the remedy of appropriation in relation to an alleged event of default.

It must however be noted, that secured creditors would strictly not form a part of the class of creditors as participating in an insolvency process. This is because their claims are directly against the collaterals/ secured assets and there are no timelines as such for enforcing a secured claim.

**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?

Under Section 2(1) of the Reciprocal Enforcement of Judgments Act 1922 (**1922 Act**), a judgment is defined as any judgement or order made by a court in any civil proceedings, whether before or after passing of the 1922 Act, whereby any sum of money is made payable. As Pinforth Holdings was awarded judgment of a monetary sum of USD 4,500,000 which appears to be final and conclusive, then enforcement can be considered under the 1922 Act.

Section 3(1) of the 1922 Act also extends to the judgements of the High Court of England and Wales and therefore, this judgement falls within the scope of this Act and maybe registrable. A foreign judgement should be registered within 12 months of the date of the judgement, unless otherwise ordered by the BVI Court. Thus, Pinforth Holdings as judgement creditor should apply to the BVI Court pursuant to Civil Procedural Rules (**CPR**) Chapter 72 for registering of the judgement by providing the necessary information and an authenticated copy of the final judgement.

It must be noted that under Section 3(2) of the 1922 Act, the BVI Court may not order a judgement to be registered if, among other things, the judgement debtor was not duly served with the process of the original court and did not appear, or the judgement was obtained by fraud or the judgement debtor satisfies the court that an appeal is pending or that he is entitled to and intends to appeal. In the event, Expat Properties Limited was not served with the proceedings in England or successfully appeals the final judgement, the judgement may not be registered. Notwithstanding this, once a judgement is duly registered under the 1922 Act, it is treated as being of the same force and effect as if a judgement had been made in BVI. This means that all remedies generally available under BVI law will be applicable to the registered foreign judgement. Pursuant to CPR 45.2, the following remedies are available and can be applied for by Pinforth Holdings Limited, once the judgment has been duly registered: (i) charging order (ii) garnishee order (iii) judgement summons (iv) order for seizure and sale of goods (v) appointment of receiver.

Enforcement of a foreign judgement and Reliefs under common law are also available if the judgement cannot be registered under the 1922 Act. However, for the present case, it appears that the matter would fall under the 1922 Act.

**Question 4.2 [maximum 9 marks]**

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

**Commented [JW11]:** 4 marks - Not all conditions under REJ1922 listed. Claim was more than 12 months but question does not state when judgment awarded and Expat did not attend hearing so not likely to be registrable but in common law remedy under doctrine of obligation action as specified sum or summary judgment then liquidation under section 162 IA2003

**Commented [JW12]:** 7 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

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?

Prior to advising Abbeydale Limited (**AL**), we must confirm if the loan agreement was secured with the Neckar Island property as collateral or not. We must also understand the terms of the loan agreement and confirm if any specific enforcement options were available under the loan agreement such as the appointment of receivers over the assets of Dendoncker Limited (**DL**).

In any event, assuming that we are not aware of the details/ security arrangement, following are the options that can be considered by AL.

1. Statutory Demand (SD)

AL as a creditor, may make a statutory demand against DL under section 155 of the IA 2003. If DL fails to satisfy the SD within 21 days from the date of its service (and subject to the SD being set aside under section 156 and 157 of the IA 2003), the DL is deemed to be insolvent under Section 8(1) of the IA 2003 and AL can then apply for the appointment of liquidators over DL for realising its assets (i.e. in this case the Neckar Island property) and distributing amongst the creditors of the company or obtain a judgment sum against AL.

While an SD is not strictly a pre-requisite for winding-up action against a company on the grounds of insolvency under IA 2003, the BVI court through its recent decisions have emphasized the importance of serving a SD on the debtor prior to applying for appointment of liquidators as a first step to liquidation proceedings. In *A Creditor v Anonymous Company Ltd*<sup>4</sup>, Justice Jack J referring to and reaffirming his view in *Rangecroft Ltd v Lenox International Holdings Ltd*<sup>5</sup> and *IS Investment Fund Segregated Portfolio Company v Fair Cheerful Ltd*<sup>6</sup> that the Court will generally not exercise its discretion to appoint liquidators if as a result of the failure to serve a statutory demand, the debtor was deprived of an opportunity to refer the matter to arbitration.

2. Application for Winding-Up/ Liquidation proceedings

As mentioned above, a creditor i.e. AL in this case can petition to wind-up a company i.e. DL on the grounds of insolvency.

Section 8(1) of the IA 2003, provides that a company is insolvent if it:

- fails to satisfy the requirements under a valid SD
- fails to satisfy a judgement, decree or order of the BVI Court granted in favour of a creditor of such company, in whole or in part;
- if it either (i) balance sheet insolvent i.e. it is proved to the satisfaction of the court that the company's liabilities exceed its assets. Section 10 of the IA 2003 provides are very definition of liability and includes a debt and which maybe, among other things, 'present or future, certain or contingent, fixed or liquidated' (Section 10(2)). However, The BVI Court of Appeal clarified and confirmed in its decision in *Trade and Commerce Bank v Island Point Properties*<sup>7</sup> that a company, may not be

<sup>4</sup> BVIHC (COMC), anonymous, 28 January 2021

<sup>5</sup> BVIHC (COM) 2020/37, unreported, 6 July 2020

<sup>6</sup> BVIHC (COM) 2020/0034, unreported, 16 July 2020

<sup>7</sup> BVICA 2009/12

considered balance sheet insolvent where value of the company's assets became lower than its liabilities only for a short period of time.

Or (ii) cash flow insolvent i.e. the company is unable to pay its debts as they fall due. This is usually a question of fact and if the debtor's inability to pay debts is proved to the satisfaction of the court, it is sufficient evidence of insolvency.

Insolvency on any of the above grounds will enable AL to petition the BVI court for the appointment of a liquidator. In the present set of circumstances, it appears that DL is cash flow insolvent as it has failed to pay the debts as they fall due (and failed to address the demand under the loan agreement).

#### Appointment of liquidators:

AL, as a creditor, can apply for the appointment of a liquidator over DL under Section 162(2) of the IA 2003. Insolvency professional can be nominated as liquidators (and if AL prefers a foreign insolvency professional as a liquidator, it can do so alongside a BVI insolvency professional).

Once the liquidators are duly appointed, they can exercise powers granted under the Court order and also encompassed under Section 186 (and Schedule 2) of the IA 2003 which includes the power to sell and dispose of property of the company (Section 6, Schedule 2). Thus, the Necker Island property can be disposed of by the liquidator if appointed properly by AL.

It must however be noted that such applications are class action and any recoveries would be shared amongst all creditors on an equal basis.

#### Appointment of provisional liquidator

Provisional liquidation is a form of interim relief and provisional liquidators (**PL**) are generally appointed to companies in the BVI where (i) the company itself consents to such appointment or (ii) PLs required to maintain the value of assets of the company (Section 170(4) of the IA 2003). Whenever there is a risk of dissipation of assets of the company, misconduct or mismanagement by directors etc., PLs are considered to be appointed. The threshold for their appointment is very high and the court will need to be satisfied that the case at hand would satisfy such threshold.

An application for PL appointment may be made by a creditor or an applicant where an application for appointment of liquidators has been made (i.e. filed but not yet determined) under Section 170 of IA 2003. However, given the present facts, there doesn't appear to be any supporting strong evidence that DL was actually dissipating assets of the company or that there was any mismanagement. Unless there is supporting evidence to this effect, this option may not be relevant.

### 3. Receivership

Receivers can essentially be appointed (i) by court or (ii) out of court i.e. under a security document. In BVI, this remedy is commonly used by secured creditors for the enforcement of their security in the event of default as per the terms of the security document. The receiver is normally appointed out of court pursuant to the terms of the security document and does not need a court order. Also, usually the receivers are appointed over the shares of the company giving them control over the company eventually by way of executing the necessary resolutions and changing the composition of the board of directors of the company.

In this instant case, as we do not know the details of the contractual arrangement between AL and SL, an application may be made for appointment of receiver by court subject to the terms of the loan agreement.

Some helpful guidance was provided in the case of *Norgulf Holdings Limited v Michael Wilson and Partners*<sup>8</sup> in relation to considerations of the court while appointing receivers over a company:

(i) The applicant must have a good arguable case in respect of the claim. The threshold for the appointment of receivers is higher than that for a freezing injunction (another remedy as explained below). This is because the court considers the appointment of a receiver to be a 'more intrusive, more expensive, and less reversible than the grant of an injunction' as it is a more draconian remedy

(ii) There must be a real risk of dissipation of assets. This needs to be demonstrated by proper supporting evidence in such application to appoint a receiver.

From the facts, it is not entirely clear if that the above conditions may be satisfied, but if strong evidence as to dissipation of assets of SL can be made to the court, an order for the appointment of a receiver may be granted. Once appointed, the receiver has several powers under the BVI law including the power of sale of assets and could also consider selling the Necker Island property in BVI for the payment to all stakeholders including AL. It must be noted however, there are several duties of a receiver while performing a sale, which among other things, includes the duty to obtain the best reasonable price for the property.

#### 4. Injunctive relief

While this is not specifically insolvency related but if there is a real and serious risk of dissipation of assets which would render any future judgment ineffective (which could include an imminent transfer of shares of DL which holds the assets) then AL may have grounds to consider seeking injunctive relief. This relief can be sought prior to or after debt proceedings have been commenced. A freezing injunction is usually the remedy contemplated by persons in the case where immediate protection is needed from the defendant disposing all or part of his assets. It is an interlocutory injunction. If AL can with supporting evidence prove that a freezing order is necessary, the court may injunct SL from dealing with its assets which will protect the interests of AL.

**\* End of Assessment \***

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<sup>8</sup> BVI HCVAP 2007/2008 (29 October 2007, unreported)