



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 3B

THE INSOLVENCY SYSTEM OF THE UNITED KINGDOM (ENGLAND AND WALES)

This is the **summative (formal) assessment** for **Module 3B** of this course and is compulsory for all candidates who **selected this module as one of their compulsory modules from Module 3**. Please read instruction 6.1 on the next page very carefully.

If you selected this module as **one of your elective modules**, please read instruction 6.2 on the next page very carefully.

The mark awarded for this assessment will determine your final mark for Module 3B. 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 MS Word format, using a standard A4 size page and a 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: **[student number.assessment3B]**. An example would be something along the following lines: 202021IFU-314.assessment3B. **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 “studentnumber” 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.**
- 6.1 If you selected Module 3B as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2021**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2021. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
- 6.2 If you selected Module 3B as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2021** or by **23:00 (11 pm) BST on 31 July 2021**. If you elect to submit by 1 March 2021, you **may not** submit the assessment again by 31 July 2021 (for example, in order to achieve a higher mark).
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]

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

What is the initial period for a Moratorium under Part 1A of the Insolvency Act 1986 where the directors file relevant documents at court?

- (a) 20 days.
- (b) **20 business days.**
- (c) 40 days.
- (d) 40 business days.

Question 1.2

What is the maximum length of a Moratorium under Part 1A of the Insolvency Act 1986 to which creditors can consent without any application to the court?

- (a) 40 business days.
- (b) One year and 20 business days.
- (c) One year and 40 business days.
- (d) **One year.**

Question 1.3

Which of the following is not a requirement for a company which wishes to enter into a Restructuring Plan under Part 26A of the Companies Act 2006?

- (a) the company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern.
- (b) a compromise or arrangement is proposed between the company and its creditors, or any class of them, or its members, or any class of them.
- (c) the purpose of the compromise or arrangement is to eliminate, reduce or prevent, or mitigate the effect of, any of the said financial difficulties.
- (d) **the company is, or is likely to become, unable to pay their debts, as defined under section 123 of the Insolvency Act 1986.**

Commented [WA1]: 48/50 = 96% an excellent effort displaying really good understanding

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Question 1.4

What percentage of creditors must approve a Scheme of Arrangement under Part 26 of the Companies Act 2006?

- (a) A majority in number and in value.
- (b) A majority in number and 50% or more in value.
- (c) A majority in number and 75% or more in value.
- (d) 75% or more in value.

Question 1.5

Which one of the following is not a debtor-in-possession procedure?

- (a) Administration.
- (b) Restructuring Plan.
- (c) Scheme of Arrangement.
- (d) Company Voluntary Arrangement.

Question 1.6

A liquidator may pay dividends to small value creditors based upon the information contained within the company's statement of affairs or accounting records. In such circumstances, a creditor is deemed to have proved for the purposes of determination and payment of a dividend where the debt is no greater than how much?

- (a) £500
- (b) £750
- (c) £1,000
- (d) £2,000

Question 1.7

Which one of the following is not, in itself, a separate ground for disqualification of a director under the Company Directors Disqualification Act 1986?

- (a) Wrongful trading.
- (b) Breach of fiduciary duty.
- (c) Being found guilty of an indictable offence in Great Britain.
- (d) Being found guilty of an indictable offence overseas.

Question 1.8

The administrator is under a general duty to make a statement setting out proposals for achieving the purpose of administration. He or she must send out the statement of proposals as soon as reasonably practicable, and in any event within how many weeks of the date the company entered administration?

(a) 6

(b) 8

(c) 10

(d) 12

Question 1.9

Which of the following has the power to bring an action for wrongful trading under the Insolvency Act 1986?

(a) A monitor of a Moratorium.

(b) A supervisor of a Company Voluntary Arrangement.

(c) An administrator.

(d) An administrative receiver.

Question 1.10

Under section 176A of the Insolvency Act 1986, the prescribed part deducted from floating charge assets in favour of unsecured creditors is calculated as follows:

(a) 20% of the floating charge assets.

(b) 50% of the first £10,000 in value plus 20% of the excess in value above the £10,000 subject to a maximum amount of the prescribed part of £600,000.

(c) 20% of the first £50,000 in value plus 50% of the excess in value above the £50,000 subject to a maximum amount of prescribed part of £800,000.

(d) 50% of the first £10,000 in value plus 20% of the excess in value above the £10,000 subject to a maximum amount of prescribed part of £800,000.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 6 marks]

What is the difference between cash flow insolvency and balance sheet insolvency?

The major difference is that when a company is cash flow insolvent, it must be shown that the company cannot pay its debts as they fall due. The concerned is on liquidity and the company's capacity to pay debts. The company would have a lot of assets (say assets which are not liquid) which can cover its liabilities. However, recently in the case of *BNY Corporate*

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Commented [WA4]: 5/6 a good answer but it would have been good to explain where the dividing line lies between the two tests and to reference s 123.

Trustee Services v Eurosail [2013] UKSC 285, the Supreme Court of the UK considered that the cash flow test was not concerned simply with the presently-due debt nor with other presently due debt owed by the company. The test would also include debts falling due from time to time in the reasonably near future and the court would evaluate all the circumstances, especially the nature of the company's business in considering what amounts to reasonably near future.

On the other hand, a company is balance sheet insolvent, its liabilities (after taking into account its future and contingent liabilities) exceed its assets. In considering the future and contingent liabilities, a suitable discount rate should be used due to the long term nature of some loans and other liabilities. However, the company may still be able to meet its current liabilities when it is balance sheet insolvent. According to *BNY Corporate Trustee Services*, the balance sheet test would only apply when the court looks beyond the reasonably near future.

Question 2.2 [maximum 4 marks]

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List **four (4)** elements of the statutory moratorium imposed when a company enters administration.

The purpose of the moratorium provides a wide stay on various actions against the company in order to give some breathing space to the administrator to formulate a proposal.

Elements of moratorium include:

- NO resolution may be passed for the winding up of the company;
- NO steps may be taken to enforce security over the property of the company, unless with the consent of the administrator or the permission of the court;
- NO legal process may be instituted or continued against the company or property of the company (including any legal proceeding or execution of any judgment), unless with the consent of the administrator or the permission of the court;
- A landlord cannot exercise his right of forfeiture by peaceful re-entry in relation to the premises leased to the company, unless with the consent of the administrator or the permission of the court.

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

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Question 3.1 [maximum 6 marks]

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Explain the main differences between a Part 26 Scheme of Arrangement and a Part 26A Restructuring Plan.

The first major difference is the eligibility. A Part 26 Scheme of Arrangement does not impose any restriction on the company to use the scheme. It can be used by both solvent and insolvent companies. However, a Part 26A Restructuring Plan can only be used (a) when the company has encountered or is likely to encounter financial difficulties that are affecting or will or may affect its ability to carry on business as a going concern; and (b) when the purpose is to eliminate, reduce or prevent or mitigate the effect of the financial difficulties.

The second major difference is the approval procedure. A Part 26 Scheme of Arrangement must be approved by a simple majority in number and a majority of 75% or more in value of each class of creditors or members present and voting. Yet, for a Part 26A Restructuring Plan, it only requires 75% or more in value of the creditors or class of creditors or members or class of members to agree to the terms. No simple majority in number is required.

The third difference is the treatment of dissenting class. A Part 26 Scheme of Arrangement would require approval from all classes of creditors or members. However, for a Part 26A Restructuring Plan, the court may still approve the Plan despite a dissenting class who disapproves (known as a cram down) so long as (a) the court is satisfied that none of the dissenting class would be any worse off than they would be in the event of the relevant alternative (usually liquidation or administration); and (b) the Part 26A Restructuring Plan has been agreed by 75% in value of at least one class of creditors or members who would receive a payment or have a genuine economic interest in the company, in the event of the relevant alternative.

Question 3.2 [maximum 9 marks]

Explain the different ways in which overseas officeholders may be recognised and request the assistance of the court in England and Wales.

There are four ways which an overseas officeholder may be recognized and request the assistance of courts in England and Wales.

The first way is by virtue of the EU Regulation on Insolvency Proceedings (Recast) ("EIR Recast"). The EU Regulation applies where the debtor company has its centre of main interest ("COMI") in any EU Member State (except Denmark). The recognition under EIR Recast is automatic and the office holders of the main insolvency proceeding (i.e., the insolvency proceeding which is opened in the debtor's COMI) would be able to exercise all powers, subject to limited exceptions. The law of the main insolvency proceeding would apply (with certain exceptions as made in EIR Recast). However, insolvency practitioners can no longer rely on the EIR Recast to seek assistance from the English court for new insolvency proceedings after Brexit in 2021.

The second way is by virtue of the UNCITRAL Model Law on Cross-Border Insolvency which is incorporated into the laws of the UK by virtue of the Cross Border Insolvency Regulations 2006 ("CBIR"). As no reciprocity requirement is introduced under CBIR, officeholders from overseas jurisdictions could apply to the court in England and Wales to be recognized in England and Wales, if the overseas proceedings are within the definition of foreign main proceeding and foreign non-main proceedings in CBIR. The recognition is not automatic and requires an application by the officeholders to the English court. The assistance available would depend on whether the proceeding is a foreign main or non-main proceeding.

The third way is by section 426 of the Insolvency Act 1986, which allows the England and Wales court to provide assistance to overseas courts. This way however, is limited to a list of jurisdictions provided therein, which are related territories of the UK, such as Channel Islands or former colonies of the UK, such as Canada, Malaysia, Hong Kong, Australia and New Zealand. The court has the discretion to provide assistance but the general rule is that such assistance should be provided unless it would be improper to do so. The English court may apply English law or overseas law in providing assistance.

The fourth way is the common law jurisdiction to grant assistance to foreign insolvency proceedings. However, the Supreme Court of the UK, in *Rubin v Eurofinance SA* [2012] UKSC 46, held that the scope of assistance under such mode is narrow.

In addition to the recognition, the officeholders may also rely Brussels Regulation to recognize and enforce judgments of courts in other EU Member States. However, Brussels Regulation does not apply to insolvency matters. Again, such route would not be applicable to new judgements after Brexit in 2021. The officeholders may also use the Foreign Judgment (Reciprocal Enforcement) Act 1933 to seek recognition of judgments of courts in jurisdictions

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which have entered into a reciprocal arrangement with the UK. However, the judgments under the 1933 Act are limited to monetary judgments only.

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

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Prior to going into liquidation in November 2020, under pressure from its bank, Stercus Bank plc, and in order to prevent it from demanding repayment of the company's loans, Cork-In Limited granted a debenture in favour of Stercus Bank plc in January 2020. The debenture contained a floating charge over the whole of the company's undertaking.

In June 2020, as the company continued to struggle, the directors approved the sale of a company delivery van to Paul Watson (a director) for £5,000 in cash. The van had been bought for £10,000 a year before.

A month before the company went into liquidation, Paul Watson received an irate phone call from one of the company's key suppliers, Gary's Grapes Limited. The supplier demanded immediate payment of all sums owing to it (even those invoices that had not become payable). Fearing being cut off by the supplier, Paul arranged for a cheque for the full amount to be sent that day.

The liquidator has asked for advice whether any action may be taken in respect of the floating charge in favour of Stercus Bank plc and the two subsequent transactions.

Using the facts above, answer the questions that follow.

Identify the relevant issues and statutory provisions and consider whether the liquidator may take any action in relation to:

Question 4.1 [maximum 5 marks]

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The floating charge in favour of Stercus Bank plc;

Under section 245 of the Insolvency Act 1986 ("IA 1986"), a floating charge which is created within the relevant time prior to the onset of insolvency of a company would be invalid unless certain exceptions apply. The period of relevant time would depend on whether the person whose the charge is created in favour for is connected with the company.

In the present case, the floating charge is created in favour of Stercus Bank plc. Under section 249 of IA 1986, a person is connected with a company if (a) he is a director or shadow director of the company or an associate of such a director or shadow director, or (b) he is an associate of the company. An associate is defined in section 435 to include a spouse, a civil partner, a relative, a trustee, a person employed by the company or under a common control (for groups of companies). Unless there is any contrary evidence, the facts provided in this case did not support that Stercus Bank plc is a director, shadow director, an associate of such a director or shadow director or an associate of Cork-In Limited. Accordingly, under section 245(3)(b), the applicable time period would be 12 months prior to the onset of insolvency

Under section 245(5) of IA 1986, the onset of insolvency, in case of a company going into liquidation, would be the date of the commencement of the winding up. As the liquidation of Cork-In Limited took place in November 2020, the floating charge, which was created in

January 2020 would be within 12 months prior to the onset of insolvency, for the purpose of section 245.

Section 245(4) however provides that where a company creates a floating charge at a time mentioned in section 245(3)(b) and the person in favour of whom the charge is created is not connected with the company, that time is not a relevant time for the purposes of this section unless the company (a) is at that time unable to pay its debts within the meaning of section 123; or (b) becomes unable to pay its debts within the meaning of that section in consequence of the transaction under which the charge is created. The conditions in section 245(4)

At present, we are not provided with any information as to the financial status of Cork-In Limited in January 2020 when the floating charge was created. Further investigation and evidence to the financial status (ie the evaluating the cash flow position and the balance sheet position as provided under section 123) are therefore needed before a conclusion can be drawn on whether the floating charge was created at the relevant time and hence would be invalidate under section 245.

Assuming that the conditions in section 245(4) are satisfied (ie the floating charge was created during the relevant time), it would be necessary to examine whether the conditions in section 245(2) are applicable. The floating charge remains valid (despite being created during the relevant time) if the conditions in section 245(2) are applicable.

Section 245(2) sets out 3 conditions: (a) the value of so much of the consideration for the creation of the charge as consists of money paid, or goods or services supplied, to the company at the same time as, or after, the creation of the charge; (b) the value of so much of that consideration as consists of the discharge or reduction, at the same time as, or after, the creation of the charge, of any debt of the company; and (c) the amount of such interest (if any) as is payable on the amount falling within (a) or (b) in pursuance of any agreement under which the money was so paid, the goods or services were so supplied or the debt was so discharged or reduced.

In the present case, the floating charge was created in favour of Stercus Bank plc in order to prevent the bank from demand repayment of the company's loans. It seems that the loans were in existence when the floating charge is created. In the absence of any other evidence, it appears that there is neither money paid or goods or services supplied to the company after the creation of the charge nor discharge or reduction of debts. Accordingly, it is considered that the conditions in section 245(2) are not satisfied.

In summary, it is submitted that the liquidator may be able to invalidate the floating charge under section 245 if it can be proved that Cork-In Limited the company (a) is at that time unable to pay its debts within the meaning of section 123; or (b) becomes unable to pay its debts within the meaning of that section in consequence of the transaction under which the charge is created. However, even if the floating charge is invalidated, the underlying debt remains valid.

Question 4.2 [maximum 5 marks]

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The sale of the van; and

The liquidator may have a potential claim against Paul Watson for transactions at undervalue under section 238 of the Insolvency Act 1986 ("IA 1986") as well as a potential claim against the board of directors for misfeasance under section 212 of IA 1986.

Under section 238, when the company goes into liquidation and has at a relevant time entered into a transaction with any person at an undervalue, the liquidator may apply to the court for

an order as the court thinks fit for restoring the position to what it would have been if the company had not entered into that transaction. "Relevant time" is defined under section 240 as a period of a period 6 months or 2 years, ending at the onset of insolvency, depending on whether the transaction is carried out with a person connected with the company. "Onset of insolvency" is defined in section 240(3) to include a company going into liquidation, the date of the commencement of the winding up.

Section 240(2) provides that where a company enters into a transaction at an undervalue, that time is not a relevant time unless the company (a) is at that time unable to pay its debts within the meaning of section 123 or (b) becomes unable to pay its debts within the meaning of that section in consequence of the transaction. However, section 240(2) would be presumed to be satisfied if the transaction was entered into with a connected person.

The transaction involved Paul Watson, the director of Cork-In Limited, who is considered to be a connected person with the company under section 249. The section 240(2) insolvency condition would be presumed. However, it is open to Paul Watson to submit contrary evidence to rebut the presumption. A prudent liquidator hence shall also investigate the financial status of the company before deciding to take action under section 238.

Further, the relevant time would be a period of 2 years, ending when Cork-In Limited entered into liquidation in November 2020. The transaction took place in June 2020 and hence would fall within the relevant time.

Section 238(3) provides that a company enters into a transaction with a person at an undervalue if (a) the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration; or (b) the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company.

In this case, Paul Watson paid £5,000 in cash. Accordingly, Cork-In Limited received a consideration and hence would not be a gift. Limb (a) is not applicable. As to limb (b), we are only provided with the fact that the van had been bought for £10,000 a year before (June 2019). There was no information as to the value of the van in June 2020. The liquidator would need to carry out further investigation, say by appointing a valuer, as to the possible value of the van used for 1 year. It may also necessary to review the conditions of the van (say whether it was involved in a car accident or any improvements have been made) in assessing the fair value of the van as at June 2020. The liquidator is only in the position to assess whether the £5,000 consideration is significantly less than the value when the valuation of the van is available.

Assuming that limb (b) is satisfied, under section 238(5), the court would only order Paul Watson to make a restoration order unless it is satisfied (a) that the company which entered into the transaction did so in good faith and for the purpose of carrying on its business; and (b) that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company. At present, the only information which we have is that the transaction was entered due to the continuation of the struggle of the company. Further investigation by the liquidator is needed as to why and how the board considered when approving to sale the van to Paul Watson in order to evaluate whether section 238(5) would be applicable.

As to misfeasance under section 212 of IA 1986, a claim is allowed if the company is in the course of winding up and a person who is or has been an officer (which is defined to include a director) of the company, has misapplied or retained, or become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of any fiduciary

or other duty in relation to the company. The court may, on the application of the official receiver or the liquidator, or of any creditor or contributory, examine into the conduct of the person and compel him (a) to repay, restore or account for the money or property or any part of it, with interest at such rate as the court thinks just; or (b) to contribute such sum to the company's assets by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just.

At present, the board of directors decided to sell the asset of the company to another director. This appears to be a circumstance which is worthy of investigation by the liquidator, in particular whether the directors were in breach of their fiduciary duties owed to the company in the process of approving the transaction (for example: Was Paul Watson involved in the approval; any proper valuation is obtained; any attempt to locate a third party who can pay a better price). If any misfeasance is located, the liquidator may be able to seek restoration of the money from the directors concerned.

Question 4.3 [maximum 5 marks]

The payment to Gary's Grapes Ltd.

The liquidator may be able to avoid the transaction under section 239 of the Insolvency Act 1986 ("IA 1986") for preferences.

Under section 239, when the company goes into liquidation and has at a relevant time given a preference to any person, the liquidator may apply to the court for an order as the court thinks fit for restoring the position to what it would have been if the company had not entered into that preference.

"Relevant time" is defined under section 240 as a period of a period 6 months or 2 years, ending at the onset of insolvency, depending on whether the transaction is carried out with a person connected with the company. "Onset of insolvency" is defined in section 240(3) to include a company going into liquidation, the date of the commencement of the winding up.

Section 240(2) provides that where a company gives a preference, that time is not a relevant time unless the company (a) is at that time unable to pay its debts within the meaning of section 123 or (b) becomes unable to pay its debts within the meaning of that section in consequence of the transaction. However, section 240(2) would be presumed to be satisfied if the transaction was entered into with a connected person.

Under section 249 of IA 1986, a person is connected with a company if (a) he is a director or shadow director of the company or an associate of such a director or shadow director, or (b) he is an associate of the company. An associate is defined in section 435 to include a spouse, a civil partner, a relative, a trustee, a person employed by the company or under a common control (for groups of companies).

At present, there is no evidence to suggest that Gary's Grapes Limited is a connected person of Cork-In Limited. Accordingly, the period would be 6 months ending at the commencement of winding up and the presumption of insolvency does not apply. We are not provided with any information as to the financial status of Cork-In Limited in October 2020 on whether Cork-In Limited was actually cash flow insolvent or balance sheet insolvent or becomes unable to pay its debt upon paying Gary's Grapes Limited. However, given the close time limit to the liquidation (just 1 month before going into liquidation), it appears that the liquidator would have a good chance to prove insolvency under section 240(2) of IA 1986.

Commented [WA12]: 4/5 again a very good answer but incorrect on the presumption against a connected person under s 239 - a minor point

On the assumption the insolvency requirement under section 240(2) is satisfied, according to section 239(4), a company gives a preference to a person if (a) that person is one of the company's creditors or a surety or guarantor for any of the company's debts or other liabilities; and (b) the company does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done.

Gary's Grapes Limited no doubt would be a creditor of Cork-In Limited, given its status as a key supplier. Further, as Gary's Grapes Limited has received all sums (including sums not yet become payable) owing to it by Cork-In Limited, it is considered that Gary's Grapes would be very likely to be in a better position than what it would have been in if the full payment had not been made when it is only an unsecured creditor, who would rank last during the distribution process for liquidation. Gary's Grapes also enjoyed early payments for sums which were not yet due.

Section 239(5) of IA 1986 then provides that the court shall not make an order in respect of a preference given to any person unless the company which gave the preference was influenced in deciding to give it by a desire to produce in relation to that person the effect of putting that person into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done. The desire is presumed if the preference is given to a person who is connected with the company.

As discussed above, there is no evidence to suggest that Gary's Grapes Limited is a connected person of Cork-In Limited and hence the presumption would not apply. In *Re MC Bacon Ltd* [1990] BCC 78, the court held that a distinction must be drawn between intention, as an objective concept and desire, as a subjective concept. It was also held that when the company was influenced solely by commercial consideration, specifically attempts to ensure that the company continued trading, there would not be a desire to prefer.

In this case, Gary's Grapes was the major supplier of Cork-In Limited and demanded for all sums owed to it (including invoices not yet payable) to be settled immediately. According to the facts provided, Paul Watson, the director, arranged to pay the full amount for the fear that Gary's Grape would cut off its supply. This seems to suggest that Gary's Grapes would have threatened Cork-In Limited that it would cut off its supply unless and until full payments to all outstanding sums were made. Accordingly, given the major supplier status, it appears fairly arguable that the payment is made by Cork-In Limited under commercial considerations to continue its trading and hence would not be a desire to prefer. Nonetheless, with limited facts provided, it would be reasonable for the liquidator to carry out further investigations to verify the underlying reason for such payment.

In summary, based on the available evidence, it appears that the liquidator would be unlikely to establish a claim under section 239 for preferences against Gary's Grapes Limited.

*** End of Assessment ***