



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 [JL1]: TOTAL: 47 OUT OF 50
Excellent!

Commented [JL2]: 8 out of 10

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.

Commented [JL3]: b

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.

Commented [JL4]: c

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]

Commented [JL5]: 10 out of 10

Question 2.1 [maximum 6 marks]

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

Cash flow insolvency

- 1 Section 123 of the Insolvency Act 1986 ("**the Act**") contains two tests of insolvency. *First*, the "cash flow" or "commercial" test. *Second*, the "balance sheet" or factual insolvency test.
- 2 The fundamental difference between the two tests is that in order to demonstrate cash flow insolvency, one needs to prove that a company cannot pay its debts as and when they fall due. Whereas even if a company is able to pay its debts as they fall due, it may still be regarded as balance sheet insolvent if its liabilities (including future and contingent liabilities) exceed its assets. Put differently, cash flow insolvency refers to commercial insolvency, whereas balance sheet insolvency refers to factual insolvency. Section 123 of the Act allows either or both tests to be satisfied in order to demonstrate that a company is unable to pay its debtors to justify the court making a winding up order.
- 3 Section 123(1)(e) of the Act provides that a company is deemed unable to pay its debts "*if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due*". For a long time, this was considered to include debts currently owed and not debts which may be owing in future. However this approach has changed in that the court may consider both debts which may be currently owing and those which may become due in the reasonably near future. It is understandably argued that the court's recent stream of cases has thus created some uncertainty as to where the cash flow test ends and the balance sheet test begins when deciding upon a company's insolvency.
- 4 Lord Walker in *Eurosail* explained that the cash flow test "*is concerned not simply with the petitioners own presently – due debt, nor only with other presently – due debt owed by the company, but also with debts falling due from time to time in the reasonably near future. What is reasonably near future, for this purpose, will depend on all the circumstances, but especially on the nature of the company's business*". Lord Walker explained further that once the consideration of the company's financial condition requires the court to move on from the reasonably near future (whose duration will vary depending upon the company's individual circumstances) any attempt to apply the "cash flow" test becomes merely speculative. It is at this point that a court must consider the balance sheet test, that is, whether a company's assets outweigh its liabilities (which test includes a requirement to account of future and contingent as well as current liabilities).

Balance sheet insolvency

- 5 The Supreme Court in *Eurosail* held that once the court looks beyond the reasonably near future, the cash flow test falls away and the court instead looks to the balance sheet test to compare the value of present assets with present, future and contingent liabilities. The balance sheet test is relatively easy to apply or conduct where a company does not have contingent liabilities but only has current liabilities. One need only subtract the value of the liabilities from that of the company's assets. As stated above, balance sheet insolvency refers to factual insolvency.
- 6 The problem arises, as Lord Walker admitted, in deciding how a court must discount the future and contingent liabilities to take account of deferment and probability. His Lordship held that the process was "*very far from an exact test*". On the facts of *Eurosail*, as some of the future liabilities may not have been fully determined for another 30 years, the court could not be satisfied that there would eventually be a deficiency. Unfortunately the Supreme Court did not offer much guidance as to how future and contingent liabilities might be quantified for purposes of section 123(2).
- 7 Although under the balance sheet test the court must take into consideration future and contingent liabilities, some discounting is required due to the long term nature of some of the loans or other liabilities.
- 8 The implication of *Eurosail* appears to be that creditors relying upon debts falling due in several years time, or which are contingent, will need overwhelmingly convincing evidence that those future or contingent liabilities make the company insolvent today.

Commented [JL6]: 6

Question 2.2 [maximum 4 marks]

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

- 1 The purpose of a moratorium is to afford the company in administration some breathing space to reorganise its affairs. That is why while a company is in administration, a moratorium prevents the following actions against the company:-
 - 1.1 no resolution may be passed for the winding up of the company;
 - 1.2 no winding up order may be made against the company (other than on public interest grounds);
 - 1.3 no step may be taken to enforce security over the company's property except with the consent of the administrator or the permission of the court;
 - 1.4 no step may be taken to repossess goods in the company's possession under a hire/purchase agreement (which term includes retention of title contracts) except with the consent of the administrator or the permission of the court;
 - 1.5 a landlord may not exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company except with the consent of the administrator or the permission of the court;
 - 1.6 no legal process (including any legal proceedings or execution of any judgment) may be instituted or continued against the company or property of

the company except with the consent of the administrator or the permission of the court;

1.7 no administrative receiver may be appointed.

Commented [JL7]: 4

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

Commented [JL8]: 15 out of 15

Question 3.1 [maximum 6 marks]

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

- 1 There are three main differences between a Part 26 Scheme of Arrangement and a Part 26A Restructuring Plan.
- 2 *First* - a Part 26A Restructuring Plan is only available to a company which has encountered, or is likely to encounter financial difficulties that are affecting, or may affect, its ability to carry on business as a going concern. Whereas a Part 26 Scheme of Arrangement is available to both solvent and insolvent companies. It's designed primarily for the reorganisation of solvent companies even though it is frequently used by companies which are insolvent or are likely to be insolvent.
- 3 *Second* - a majority in number of each class of creditors must approve a Part 26 Scheme (as well as 75% in value), whilst a Part 26A Plan only requires 75% in value.
- 4 *Third* - a Part 26A Restructuring Plan contains a provision for a cross-class cram down, whilst a Part 26 Scheme of Arrangement does not contain such or a similar provision.

Commented [JL9]: 6

A very succinct answer – as this is an essay question it might have been more sensible to elaborate and discuss the distinctions. I have not penalized you.

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.

- 1 There are about four ways in which overseas officeholders may be recognised and request the assistance of the court in England and Wales. As to which one is applicable or of assistance to any proceedings or overseas officeholders will depend on the nature of the proceedings and which other jurisdictions are involved.
- 2 *The first* is under the EU Regulation Recast ("**EIR Recast**") which replaced its predecessor (i.e. EIR 2000). In this regard, cross-border insolvency proceedings which involve companies with their centre of main interest ("**the COMI**") within any EU member state, with the exclusion of Denmark, are governed by the EIR Recast, which is a revision of its predecessor which it replaced (i.e. the EU Regulation 2000). The EIR Recast does not harmonise insolvency laws across member states but establishes rules on *inter alia* the jurisdiction to commence insolvency proceedings and the law which applies to such proceedings. Where a company's COMI is in the UK, only the UK will have the jurisdiction to open main insolvency proceedings such as administration. Those proceedings would be governed by UK law in every respect, save for certain exceptions which include rights of secured creditors and employees in other member states. Furthermore, and more important and relevant to the question at hand, any appointment will be recognised automatically in all other member states and the insolvency practitioner will be able to exercise all powers,

subject to limited exceptions. The benefit of having one main proceeding recognised in all EU jurisdictions is that it enables a single concerted approach to the insolvency, which is likely to encourage any possible rescue and will usually cut down on costs so as to realise assets to the benefit of the general body of creditors and other stakeholders. If the company has an establishment in another member state, secondary proceedings may be commenced in that member state and assets belonging to the company in that member state will be insulated for the benefit of creditors in that other member state. It is said that one of the major benefits of the EIR Recast is that it works across the EU for both “*inward-bound*” (where a member state officeholder is automatically recognised in the UK) and “*outward-bound*” (where a UK officeholder is recognised in other member state) insolvencies.

- 3 *The second way* is under the UNCITRAL Model Law on cross-border insolvency (“**Model Law**”) which was incorporated into UK law, with minor amendments, by the cross-border insolvency regulations 2006/SI 2006/1030 (“**CBIR**”). Insolvency practitioners from any overseas jurisdiction may apply to the court in England and Wales to be recognised. The “*outward-bound*” benefits for the UK are limited to the other states who have adopted Model Law. It is said that one major shortcoming which the Model Law has in contrast with the EIR Recast, is that under the Model Law the recognition of foreign insolvency proceedings is not automatic. That is to say it requires an application to a local court to obtain recognition and relief.
- 5 *The third* is section 426 of the Act. It contains provisions for UK courts to provide assistance to overseas courts from certain listed jurisdictions. The origins of section 426 date back to the British Prime Minister and provisions which permitted recognition and assistance to court orders made in the former colonies. In terms of section 426, court orders made in insolvency matters by a court in the UK are strictly enforceable in all parts of the UK. Additionally, there is an obligation on UK courts to assist each other and also the courts of “*any relevant country or territory*”. Those countries and territories are made up of the Channel Islands and the Isle of Man and any other country or territory specified by the Secretary of State. Countries who enjoy the benefit of the “*inward-bound*” effect of section 426 include Australia, Canada, Hong Kong, Ireland, Malaysia, New Zealand and South Africa. Having said that, it bears mentioning that the court retains a discretion to determine whether or not any assistance should be granted. However it has been said that they should provide assistance unless it would be improper to do so in the circumstances. Courts in the UK may apply UK law or the law of the overseas territory in providing assistance to the overseas court.
- 6 *The fourth* is possibly the common law jurisdiction to grant assistance to foreign insolvency proceedings and foreign officeholders. At some point case law suggested that UK courts had a power at common law, similar to the power under section 426 of the Act, to exercise any powers which would be available to the overseas jurisdiction requesting assistance in a domestic insolvency. However, this approach has since been disapproved and a restrictive interpretation has been placed on the UK courts common law cross-border jurisdiction. English common law has traditionally taken the view that fairness between creditors requires that, ideally, insolvency proceedings should have a universal application. That is to say, there should be a single insolvency in which all creditors are entitled to prove claims. It is said that a system of modified universalism would avoid the need for officeholders to be appointed in parallel proceedings in multiple jurisdictions. It would recognise the overseas officeholder and provide the same remedies to that officeholder as if such equivalent proceedings had commenced in the UK.

- 7 In a case which has subsequently been largely discredited, the principles of modified universalism were expounded and extended by the Privy Council in *Cambridge Gas Transport Corp vs The Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] UKPC 26. Three main principles can be extracted from Lord Hoffman's leading judgment –
- 7.1 a domestic court has a common law power to assist a foreign insolvency officeholder (insofar as it properly can subject to domestic law and domestic public policy);
- 7.2 a domestic court has common law power to assist a foreign court by doing whatever it could have done in a domestic insolvency, including exercising any domestic statutory powers; and
- 7.3 a domestic court has jurisdiction over the parties in an insolvency simply by virtue of its power to assist, and that the absence of jurisdiction *in rem* or *in personam* according to ordinary common law principle is not relevant.
- 8 Although the first principle remains undisturbed, the extent of the ability of the common law to assist has been significantly reduced by subsequent case law. The second principle has been held to be wrong by subsequent (and now leading) case of *Singularis Holdings Limited v Pricewaterhouse Coopers* [2014] UKPC 36. Similarly the third principle has been held to be wrong by the Supreme Court in *Reuben v Euro Finance SA* [2012] UKSC 46. The effect of this case law is that there remains little of modified universalism in the common law which will assist an overseas officeholder looking for assistance in the UK courts. Such an overseas officeholder would usually be better advised to consider using one of the legislative provisions set out [above](#).

Commented [JL10]: 9

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

Commented [JL11]: 14 out of 15

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]

The floating charge in favour of Stercus Bank plc;

- 1 The issue which arises here is floating charge avoidance which is governed by section 245 of the Insolvency Act. It applies where a company is in administration or liquidation and the provision is aimed at preventing pre-existing unsecured creditors obtaining the security of a floating charge shortly before a company enters a formal insolvency procedure. However it does not prevent lenders who are providing fresh funding to the company from taking a floating charge for the new funding. It renders valid floating charges given by a company at a relevant time, except to the extent, in substance, that new consideration is provided for the charge. I would submit that section 245 of the Act applies here was placed in liquidation November 2020.
- 2 In order for the floating charge to be avoided under section 245 of the Act, it must have been executed, in relation to an unconnected person, within 12 months prior to the onset of insolvency and the company must be insolvent at the time or 2 years prior to the onset of insolvency where the floating charge holder is a connected person (in which case there is no need to show the company was insolvent at the time). As the floating charge was created in favour of Stercus Bank plc, which is not connected with Cork-In Limited, the floating charge falls under the 12 month period and may be avoided accordingly (i.e it was created 5 months before the onset of insolvency).

Commented [JL12]: 5

Question 4.2 [maximum 5 marks]

The sale of the van; and

- 1 The issue which arises here is transaction at undervalue. As part of the underlying policy of the Act to treat all unsecured creditors fairly and equally, the Act permits certain transactions which were entered into shortly before the company entered formal insolvency to be open to attack. More specifically, under section 238 of the Act, a liquidator (or administrator) may attack a transaction which was entered prior to the company entering liquidation or administration where the transaction was at undervalue.
- 2 Under section 238, the liquidator or administrator must show that the company:-
 - 2.1 made a gift to another person; or
 - 2.2 entered into a transaction with another person on terms that provided for the company to receive no consideration; or
 - 2.3 entered into a transaction with another person for a consideration which, in money or monies worth, was, at the date of the transaction, significantly less than the value, in money or monies worth, of the consideration provided by the company.

- 3 In order to be attacked, the transaction must have taken place in the period of 2 years prior to the commencement of liquidation or administration.
- 4 The concept of a “*transaction*” is defined widely, to include any gift, agreement or arrangement. Whether or not the transaction was with a connected person, it is a prerequisite of liability under section 238 that, at the time the transaction was entered into, either the company was unable to pay its debts as they fell due within the meaning of section 123 or became unable to pay its debts within the meaning of that section in consequence of the transaction. In the case of a transaction with a connected person, however, the company is presumed to have been insolvent or to have become insolvent as a result of the transaction, unless the contrary is proved.
- 5 If the respondent to an application satisfies the court that the transaction was entered into by the company in good faith and for the purpose of carrying on its business, and at the time it did so there were reasonable grounds for believing that the transaction would benefit the company, then the court shall not make an order under section 238.
- 6 The court has an overriding power, if it concludes that there has been a transaction at an undervalue or a preference, to make an order restoring the position to what it would have been if the preference had not been given or the transaction had not been concluded.
- 7 For sake of completion, it bears mentioning that protection is afforded, however, to certain persons by section 241 which provides that an order shall not prejudice any interest in property which was acquired from a person other than the company, and which was acquired in good faith and for value.
- 8 I now turn to apply the above principles to our facts.
- 9 The sale of the van can be attacked under section 238 of the Insolvency Act by the liquidator because:-
- 9.1 in June 2020, as the company continued to struggle financially, the directors approved the sale of a company delivery van to Paul Watson who was a director;
- 9.2 the van was delivered to Paul Watson who is a director of the company (i.e. a connected person) for an amount of £5,000 in circumstances where the van had been bought for £10,000 the year before. It is thus clear that this was a transaction (i.e. agreement or arrangement) at undervalue. The company suffered a loss of £5,000, representing the difference between the amount it paid for the van and the amount it received from its connected director;
- 9.4 as the van was sold to a connected person (i.e. a director), it is presumed that the company was insolvent or became insolvent as a result of the transaction, unless the contrary is proved by Mr Paul Watson. I submit that Mr Paul Watson would be hard pressed to rebut this presumption because, on the facts, at the time when the sale was approved by the directors in June 2020, the company was still continuing to struggle financially;
- 9.5 the transaction falls within the 2 year period referred to above;
- 9.6 on the facts, it does not appear that Mr Watson will be able to satisfy the court that the transaction was entered into by the company in good faith and for the purpose of carrying on its business and that at the time it did so, there were

reasonable grounds for believing that the transaction would benefit the company.

Commented [JL13]: 5

Question 4.3 [maximum 5 marks]

The payment to Gary's Grapes Ltd.

- 1 The issue which arises here is one of a voidable preference in terms of section 239 of the Insolvency Act, which may be avoided by the court on application of the liquidator or administrator. In our case it would be a liquidator because the company in question was liquidated in November 2020. The underlying purpose of section 239 of the Act is to prevent a company, shortly before entering a formal insolvency procedure, from placing one of its creditors in a better position than others. For example, it prevents preferences such as a payment in full where the creditor could have expected only a dividend as an unsecured creditor upon liquidation.
- 2 An application to avoid the preference may be made only if the company has gone into liquidation or administration. Cork-In Limited was placed in liquidation in November 2020 with result that an application to avoid and set aside the payment to Gary's Grapes would be competent in the circumstances. In order to succeed on an application under section 239, the liquidator or administrator must show that:-
 - 2.1 the person whom it is alleged has been preferred was, at the time of the transaction, a creditor of the company (or a surety or guarantor for any of the company's liabilities);
 - 2.2 something was done, or suffered to be done, by the company which had the effect of putting that person in a better position, in the event of the company going into insolvent liquidation, than the position he/she would have been in if that thing had not been done (that is, that the person has been preferred);
 - 2.3 the company was, in giving the preference, influenced by a desire to produce the effect referred to in paragraph 2.2 above (the desire to prefer) in relation to the person preferred; and
 - 2.4 the preference was given at a relevant time.
- 3 The burden of proof in relation to each of the above matters normally rests with the officeholder. However, if the person to whom the preference was given is connected with the company (otherwise than by reason merely of being an employee of the company), then there is a presumption that the company was influenced by a desire to prefer that person. This shifts the burden onto the connected person to rebut the presumption.
- 4 In determining whether the thing done amounts to a preference, the fact that pressure was applied by the creditor (whether in requiring the company to do something, or in preventing the company from stopping the creditor exercising a self-help remedy) is irrelevant. Pressure should be considered relevant only to whether there is the requisite desire.
- 5 The relevant time within which a preference needs to have been given to fall within section 239 of the Act differs depending upon whether or not the preference is given to a connected person. For a preference to be actionable, it must have occurred

within the 2 years prior to the onset of the insolvency (in favour of a connected person) or within the 6 months prior to the onset of insolvency (if in favour of a person not connected to the company).

- 6 Whether or not the preference was given to a connected person, it is a prerequisite of liability under section 239 of the Act that, at the time the preference was given, either the company was unable to pay its debts as they fell due within the meaning of section 123 of the Act or became unable to pay its debts within the meaning of that section in consequence of the preference.
- 7 The requirement which is most difficult to establish, is the need to show the company was influenced by a desire to prefer the creditor. That is to say the company must have been influenced by the desire to put the preferred party into a position which, in the event of the company going into insolvent liquidation, will be better than the position he/she would have been in if the preference had not been given. Millet J in the leading case of *Re MC Bacon Ltd [1990] BCC 78* provided some guidance as to the meaning of the relevant desire. Millet J distinguished between intention, which is an objective concept, and a desire, which is a subjective one. In this regard, he said "A man is taken to intend the necessary consequences of his action [but] A man can choose the lesser of the two evils without desiring either". Therefore, an intention to grant security to a creditor necessarily involves an intention to prefer that creditor in the event of insolvency.
- 8 In subsequent decisions, it has been held that where the company was influenced solely by commercial considerations, specifically attempts to ensure that the company continued trading, there could be no desire to prefer.
- 9 The desire to prefer is presumed unless the contrary is shown, where the preference is given to a person connected to the company. The presumption is often very helpful and it is rare for an action to be brought under section 239 of the Act unless the person whom it is alleged has been preferred is a connected person.
- 10 I now apply the above principles to the facts. I would advise the liquidator that I believe that the payment in full to the company's supplier, Gary's Grapes Ltd, a month before the company went into liquidation is attackable as avoidable preference because:-
 - 10.1 the company went into liquidation in November 2020;
 - 10.2 Gary's Grapes Limited was at the time of the transaction, a creditor of Cork-In Limited ("**the company**");
 - 10.3 the arrangement of a cheque for the full payment to be sent a month before the company went into liquidation constitutes something that was done by the company which had the effect of putting Gary's Grapes Limited in a better position, in the event of the company going into insolvent liquidation, than the position it would have been in if it was not paid in full;
 - 10.4 although in practice this requirement is most difficult to establish because, it may be argued that the company was, in giving the preference as aforesaid, influenced by a desire to produce the effect referred to above (i.e. the desire to prefer) in relation to Gary's Grapes Ltd. On application of what Millet J said in *Re MC Bacon Ltd* on the meaning of relevant desire, it can be argued, by parity of reason, that the intention to pay Gary's Grapes in full involves an intention to prefer it in the event of insolvency;

Commented [JL14]: I think your previous comment above nullifies this one.

Was the intention to prefer them and place them in a better position or rather to maintain the supply of goods? – a commercial consideration therefore.

Unlikely that intention to prefer could be proven.

10.5 as Gary's Grapes Ltd is not a connected person, the presumption of preference does not arise here;

10.6 as the cheque was arranged a month before the company went into liquidation for Gary's Grapes who is not a connected person, it is hit by the 6 month time period referred to [above](#).

Commented [JL15]: 4
Excellent attempt.

*** End of Assessment ***