



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: **[studentID.assessment3B]**. An example would be something along the following lines: 20222-514.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 "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.**
- 6.1 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 2022**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2022. 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 2022** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. If you elect to submit by 1 March 2022, you **may not** submit the assessment again by 31 July 2022 (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

Commented [WPA1]: 45/50 = 90% an excellent effort. Well done!

QUESTION 1 (multiple-choice questions) [10 marks in total]

Commented [WPA2]: 10/10

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

Please select the **most correct ending** to the following statement:

The Administration (Restrictions on Disposal etc to Connected Persons) Regulations 2021 restrict pre-pack sales which constitute a substantial disposal of the company's property to connected parties where the disposal occurs:

- (a) within 10 weeks of the commencement of the administration.
- (b) within 8 weeks of the commencement of the administration.**
- (c) within 4 weeks of the commencement of the administration.
- (d) on the day the company enters administration.

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 that 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.

Question 1.4

In cases where the Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021 apply and an independent report from an Evaluator is obtained, the independent report must be obtained by whom?

- (a) The administrator.
- (b) Any secured creditor with the benefit of a qualifying floating charge.
- (c) The purchaser.
- (d) The company's auditor.

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 provide a statement for creditors' consideration setting out proposals for achieving the purpose of administration. He or she must obtain a creditors' decision on whether or not to approve the proposals **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 statements is **incorrect**?

(a) An insolvency officeholder from an EU Member State will be automatically recognised by the courts in the UK whether the officeholder was appointed before or after Brexit.

(b) An insolvency officeholder from an EU Member State is automatically recognised by the courts in the UK if appointed before Brexit.

(c) An insolvency officeholder from an EU Member State appointed after Brexit may apply to a UK court for recognition under the Cross Border Insolvency Regulations.

(d) An insolvency officeholder from an EU Member State cannot apply to a UK court for recognition under section 426 of the Insolvency Act 1986.

Question 1.10

Under section 216 of the Insolvency Act 1986, a director of a company which has been wound up insolvent may not, unless an exception applies, be a director of a company that is known by a prohibited name **for what period of time**?

(a) 6 months.

(b) 12 months.

(c) 2 years.

(d) 5 years.

QUESTION 2 (direct questions) [10 marks]

Commented [WPA3]: 10/10

Question 2.1 [maximum 5 marks]

Commented [WPA4]: 5/5

Who may bring an action under: (i) section 423 of the Insolvency Act 1986; (ii) section 6 of the Company Directors Disqualification Act 1986; and (iii) section 246ZB of the Insolvency Act 1986?

- (i) Pursuant to section 424(1) of the Insolvency Act 1986 ("the Act"), an action under section 423 of the Act may be brought:
 - (a) in case where the debtor has been made bankrupt or is a body corporate which is being wound up or is in administration, by the official receiver, by the trustee of the bankrupt's estate or the liquidator or administrator of the body corporate or, with the leave of the court, by a victim of the transaction;
 - (b) in case where a victim of the transaction is bound by a voluntary arrangement approved under Part I or Part VIII of the Act (CVA), by the supervisor of the voluntary arrangement or by any person who, whether or not so bound by the CVA, is such a victim;
 - (c) in any other case, by a victim of the transaction.
- (ii) Pursuant to section 7(1) of the Company Directors Disqualification Act 1986 ("CDDA"), if it appears to the Secretary of State that it is expedient in the public interest that a disqualification order under section 6 should be made against any person, an application for the making of such an order against that person may be made:
 - (a) by the Secretary of State, or
 - (b) If the Secretary of State so directs in the case of a person who is or has been a director of a company is being or has been wound up by the court in England and Wales, by the official receiver.
- (iii) According to section 246ZB(1) of the Act, an action for wrongful trading may be brought by the administrator.

Question 2.2 [maximum 5 marks]

Commented [WPA5]: 5/5

List the **five (5)** qualifying decision procedures by which creditors may make decisions in the context of an insolvent company.

- (a) Correspondence
- (b) Electronic voting
- (c) Virtual meeting
- (d) Physical meeting
- (e) Any other decision making procedure which enables all creditors who are entitled to participate in the making of the decision to participate equally.

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

Commented [WPA6]: 14/15

Question 3.1 [maximum 6 marks]

Commented [WPA7]: 5/6 a good answer. There is more that could said about ss 233 and 233A but still a very clear explanation.

Can an administrator who wishes to continue to operate the business of the company in administration require suppliers of goods and services to continue to supply those goods and services during the administration?

The appointment of an administrator does not trigger the termination of the company's executory contracts. Therefore, suppliers of goods and services continue to be bound by the contracts with the company. Contract clauses which provide for automatic termination are largely void.

Section 233B of the Insolvency Act 1986 ("the Act") stipulates that contract clauses which provide for the automatic termination of a contract or which allow the supplier of goods or services to terminate or "do any other thing" in relation to that contract because the company becomes subject to an insolvency procedure are of no effect. Section 233B of the Act also prevent suppliers from making it a condition of continued supply that pre-insolvency arrears are paid and from making other changes to contracts.

Against the will of the administrator, a supplier may only terminate a contract with an insolvent company with the permission of the court and under the condition that the court is satisfied that the continuation of the contract would cause the supplier hardship (see section 233B of the Act).

In addition, sections 233 and 233A of the Act prohibit termination of contracts by utility, communications and IT suppliers because the company become subject to an insolvency procedure.

There is only a limited number of exceptions from the prohibition of such termination terms for insurers, banks, electronic money institutions, recognised investment exchanges and clearing houses, securitisation companies, overseas companies with corresponding functions, etc.).

Hence, an administrator can in most cases require that suppliers of goods and services continue to supply goods and services during administration. However, suppliers may request of the administrator to personally guarantee payment of the charges in respect of the supply pursuant to section 233 of the Act.

Question 3.2 [maximum 9 marks]

Commented [WPA8]: 9/9

Explain the order of priority of payments in a liquidation and explain the nature of the rights enjoyed by each class of creditor or expense.

Previously to any distribution, the liquidator has to release those assets which do not belong to the insolvency estate such as assets subject to hire purchase, assigned claims or retention of title.

Holders of fixed charges will be paid out of the proceeds of the assets they are holding a charge over. What remains of such proceeds will be distributed as outlined below.

First priority in the distribution of a liquidation proceeding have the following expenses (see section 115 of the Act, rules 6.42 and 7.108 of the Insolvency Rules 2016):

- a) expenses that are properly incurred by the liquidator in preserving, realising or getting in any of the assets of the company (including the conduct of any legal proceedings);
- b) the cost of any security provided by the liquidator;
- c) any amount payable to a person to assist in the preparation of a statement of affairs or accounts;
- d) any necessary disbursements by the liquidator in the course of the winding up (including expenses incurred by the members of the liquidation committee);

- e) the remuneration of any person who has been employed by the liquidator to perform any services for the company;
- f) the remuneration of the liquidator;
- g) the amount of any corporation tax on chargeable gains accruing on the realisation of any asset of the company; and
- h) any other expenses properly chargeable by the liquidator in carrying out the liquidator's functions in the winding up.

The assets which remain after full payment of the expenses will then be distributed to creditors with preferential claims. There are two classes of preferential debts, ordinary and secondary. Ordinary preferential debts are paid before secondary preferential debts. Preferential debts, which are part of the same class, rank equally amongst themselves and participate with the same fractional amount in the remaining assets (*pari-passu*) if the company's assets are insufficient to pay them all.

The following debts are ordinary preferential debts according to Schedule 6 of the Act:

- a) any sum owed on account on an employee's contribution to an occupational pension scheme, being contributions deducted from earnings of the company's employees paid in the period of four months prior to the commencement of the winding up;
- b) any sum owed by the company on account of an employer's contribution to an occupational pension scheme in the period of 12 months before the relevant date;
- c) remuneration owed by the company to a person who is or has been an employee of the debtor and is payable in respect of the whole or any part of the period of four months prior to the commencement of the winding up to a maximum total figure which is currently GBP 800.-;
- d) any amounts owed by the company by way of accrued holiday remuneration in respect of any period of employment before the winding up;
- e) claims for monies advances to pay wages or holiday remuneration;
- f) levies on the production of coal and steel referred to in art. 49 and art. 50 of the European Coal and Steel Community Treaty;
- g) claims for so much of any amount which is ordered to be paid by the company under the Reserve Forces Act 1985, and is so ordered in respect of a default made by the company in the discharge of its obligations under that Act;
- h) So much of any amount owed by the company in respect of an eligible deposit as does not exceed the compensation that would be payable in respect of the deposit under the Financial Services Compensation Scheme to the person or persons to whom the amount is owed;

The following debts are secondary preferential debts pursuant to section 386 of the Act:

- a) So much of any amount owed by the company to one or more eligible persons in respect of an eligible deposit as exceeds any compensation that would be payable in respect of the deposit under the Financial Services Compensation Scheme to the person or persons;

- b) Any amount owed by the company to one or more eligible persons in respect of a deposit that:
 - a. Was made through a non-UK branch of a credit institution authorised by the competent authority of the UK, and
 - b. Would have been an eligible deposit if it had been made through a UK branch of that credit institution.
- c) PAYE income tax deductions, national insurance deductions, VAT payments, Construction Industry Scheme deductions and student loan repayments.

Once the above preferential debts have been paid, any floating charge holder will be paid. If there is more than one floating charge holder priority between them usually is given to the floating charge which was created first.

If the floating charge has been created on or after 15 September 2003 must save a prescribed part of the company's net property for the satisfaction of unsecured creditors and must not distribute the prescribed part to floating charge holders according to section 176A of the Act. Where the company's net property does not exceed GBP 10'000.-, the prescribed part is 50% of that property. However, the liquidator may decide not to save the prescribed part for unsecured creditors where the property is less than the prescribed minimum of GBP 10'000.- and the liquidator considers it to be disproportionate to make a distribution to unsecured creditors in comparison to the benefits.

Where the company's net property exceeds GBP 10'000.-, the prescribed part is the sum of 50% of the first GBP 10'000.—in value, plus 20% of the excess in value above the GBP 10'000.—, subject to a maximum amount of the prescribed part of GBP 800'000.-.

A floating charge holder is not allowed to participate in the distribution of the prescribed part with any possible outstanding unsecured balance.

The last creditors to be paid are the unsecured creditors. They receive up to their claims whatever is left if anything at all. Unsecured creditors will all receive the same fractional amount for their claims unless a creditor submitted to a subordination agreement according to which other creditors (unsubordinated) have priority and will be paid first.

If there should be a surplus after all creditors have been paid this surplus is distributed amongst the shareholders of the company.

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

Commented [WPA9]: 11/15

Prior to going into compulsory liquidation on 23rd December 2021, under pressure from its bank, Stercus Bank plc, and in order to prevent it from demanding repayment of the company's loans, Corfee Zero Limited ("the Company"), granted a debenture in favour of Stercus Bank plc in February 2021. The debenture contained a floating charge over the whole of the Company's undertaking.

The winding up order followed a creditor's winding up petition issued on 14th October 2021.

In July 2021, as the Company continued to suffer cash flow problems, the directors approved the sale of 5 coffee roasting machines to Ann Young (a director) for £10,000 in cash. The machines had been bought for £25,000 a year before.

A month before the winding up order was made, Ann Young received an email from Beans and Leaves Ltd, one of the Company's key suppliers. The supplier demanded immediate payment of all sums owing to it and informed the Company that further supplies would only be made on a cash on delivery basis. As the continued supply of coffee beans was seen as essential by the Company, the board authorised a payment of £8,000 to cover existing liabilities and agreed to further payments, on a cash on delivery basis, for further supplies which amounted to further payment of £3,000 up to the date of the winding up order.

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]

Commented [WPA10]: 5/5

The floating charge in favour of Stercus Bank plc;

According to section 245(2) of the Act, a floating charge on the company's undertaking or property created at a relevant time is invalid except to the extent of the aggregate of

- (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 paragraph (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.

Pursuant to section 245(3)(b) of the Act, the time at which a floating charge is created by a company is a relevant time for the purposes of this section if the charge is created at a time in the period of 12 months ending with the onset of insolvency in the case of a charge which is created in favour of person who is not connected with the company.

According to section 245(4) of the Act, where a company creates a floating charge at a time mentioned in subsection (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 of the Act, 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.

Pursuant to section 245(5)(d) of the Act, the onset of insolvency is, in case where section 239 applies, by reason of a company going into liquidation, the date of the commencement of the winding up.

Given that Stercus Bank plc is not a company who is connected to Corfee Zero Limited in the meaning of section 245(3)(a) of the Act and the period between the granting of the debenture

in February 2021 and the onset of insolvency on 23rd December 2021 was not more than 12 months, the granting of the debenture was within the relevant time in order for the liquidator to make a successful application to the court for an order to avoid the transaction based on section 245 of the Act.

The debenture was granted as security to an already existing loan. Therefore, none of the exceptions under section 245(2) of the Act apply.

It is, however, unclear if the company was unable to pay its debts within the meaning of section 123 of the Act at the time the debenture was granted or that it became unable to pay its debts in consequence of the granting of the debenture (see section 245(4) of the Act).

If the liquidator is convinced that the company was unable to pay its debts at the time when the debenture was granted or became unable to pay its debts in consequence of the granting of the debenture he may reject the claim of Stercus Bank plc for a floating charge and approve the bank's claim only as unsecured claim in the liquidation proceedings.

Question 4.2 [maximum 6 marks]

Commented [WPA11]: 6/6

The sale of the coffee roasting machines; and

According to section 238(2) of the Act, the office-holder may apply to the court for an order under this section where the company has at a relevant time entered into a transaction with any person at undervalue.

Pursuant to section 238(3) of the Act, the court may, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction.

According to section 238(4) of the Act, for the purposes of this section and section 241, 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.

Pursuant to section 238(5) of the Act, the court shall not make an order under this section in respect of a transaction at an undervalue if 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.

According to section 240(1) of the Act, the time at which a company enters into a transaction at an undervalue is a relevant time if the transaction is entered into at a time in the period of 2 years ending with the onset of insolvency in the case of a transaction at an undervalue with a person who is connected with the company.

Pursuant to section 240(2) of the Act, where a company enters into a transaction at an undervalue at a time mentioned in subsection (1)(a) or (b), that time is not a relevant time for the purposes of section 238 unless the company

- (a) is at that time unable to pay its debts within the meaning of section 123 of the Act, or

(b) becomes unable to pay its debts within the meaning of that section in consequence of the transaction;
but the requirements of this subsection are presumed to be satisfied, unless the contrary is shown, in relation to any transaction at an undervalue which is entered into by a company with a person who is connected with the company.

Pursuant to section 240(3)(e) of the Act, the onset of insolvency is, in case where section 238 applies, by reason of a company going into liquidation, the date of the commencement of the winding up.

As a director of the company, Ann Young qualifies as a person who is connected with the company. Therefore, the relevant time for an avoidable transaction at undervalue is two years ending with the date of the commencement of the winding up on 23rd December 2021 (see sections 240(1) and 240(3) of the Act). Hence, the sale of the coffee roasting machines in July 2021 was clearly within the relevant time.

If the sale of the coffee roasting machines for a price of GBP 10'000.—was significantly less than the actual value of these machines is not quite clear (see section 238(4)(b) of the Act). The machines had been bought for a price of GBP 25'000.- a year before. If these machines would suffer a dramatic depreciation after one year of use it could be that the sales price of GBP 10'000.- was reasonable. Such a big price difference is, however, suspicious and a court could probably easily be convinced that this was a transaction at undervalue.

However, given that the company had cash flow problems at the time of the sale of the coffee roasting machines, it may sold the machines at undervalue in good faith and for the purpose of carrying on its business and it may had reasonable grounds for believing that the transaction would benefit the company (see section 238(5) of the Act). That would be the case if cash was needed urgently and there were no other potential buyers for these machines which would have bought these machines within a relatively short period of time. Given that the machine were sold to a person who is connected to the company, it is to be expected that the court would apply this exception strictly in order to prevent abuse and only refrain from an order based on section 238(5) of the Act if Ann Young is able to provide proof that the directors of the company were looking for other potential buyers but were not able to find any.

The requirement that the company was unable to pay its debts at the time when the coffee roasting machines were sold to Ann Young or that the company became unable to pay its debts in consequence of the transaction is presumed to be satisfied, unless the contrary is shown, because Ann Young is person who is connected with the company (see section 240(2) of the Act).

Hence, the liquidator may make an application to the court based on section 238 of the Act requesting the avoidance of the sale of these coffee roasting machines.

Additionally, the liquidator could make an application to the court based on section 423 of the Act, if he is convinced that these machines were sold at undervalue for the purpose

- (a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against the company, or
- (b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.

Question 4.3 [maximum 4 marks]

The payments to Beans and Leaves Ltd.

Commented [WPA12]: 0/4 unfortunately the issue is misidentified – it cannot be s 239 due to the petition beginning the winding up proceedings before the payment is made. The issue is covered by s 127.

According to section 239(2) of the Act, the office-holder may apply to the court for an order under this section where the company has at a relevant time given a preference to any person.

Pursuant to section 239(3) of the Act, the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not given that preference.

Pursuant to section 239(4) of the Act, a company gives a preference to a person for the purpose of this section 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.

According to section 239(5) of the Act, the court shall not make an order under this section 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 mentioned in subsection (4)(b).

Pursuant to section 240(1)(b) of the Act, subject the time at which a company gives a preference is a relevant time if the preference is given at a time in the period of 6 months ending with the onset of insolvency if the preference was not given to a person who is connected with the company.

According section 240(2) of the Act, where a company gives a preference at a time mentioned in subsection (1)(a) or (b), that time is not a relevant time for the purposes of section 239 unless the company

- (a) is at that time unable to pay its debts within the meaning of section 123 in Chapter VI of Part IV, or
- (b) becomes unable to pay its debts within the meaning of that section in consequence of the preference.

Pursuant to section 240(3)(e) of the Act, the onset of insolvency is, in case where section 239 applies, by reason of a company going into liquidation, the date of the commencement of the winding up.

Given that Beans and Leaves Ltd is not a company who is connected to Corfee Zero Limited in the meaning of section 240(1)(a) of the Act, the relevant time for the avoidance of preference transaction is 6 months. The payment of existing debts towards Beans and Leaves Ltd and the agreement on cash on delivery basis was, however, only one month before the commencement of the winding up and, therefore, within the relevant time.

Nevertheless, there are no indications that the company had a desire to prefer Beans and Leaves Ltd by paying existing debts and agreeing on cash on delivery basis. The motivation of the company to make these payments was to be able to continue its business but not to give an advantage to Beans and Leaves Ltd in possible liquidation proceedings. Therefore, the transaction may not be avoided due to the lack of desire on the side of the company to prefer Beans and Leaves Ltd (see section 239(5) of the Act; Re MC Bacon Ltd. [1990] BCC 78).

Additionally, it is not clear if the company was unable to pay its debts within the meaning of section 123 of the Act at the time the payments were made (certainly not in relation to the

debts towards Beans and Leaves Ltd) or that it became unable to pay its debts in consequence of the payments towards Beans and Leaves Ltd (see section 240(2) of the Act).

Hence, the conditions to avoid the payments of the company towards Beans and Leaves are not fulfilled and the liquidator may not take any action in this regard.

*** End of Assessment ***