



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

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

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.

Commented [WPA1]: 37/50 = 74% - evidence of much work and thought. A good effort.

Commented [WPA2]: 6/10

Commented [WPA3]: D is correct

(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.

Commented [WPA4]: B is correct

- (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

Commented [WPA5]: C is correct

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.

Commented [WPA6]: D is correct

QUESTION 2 (direct questions) [10 marks]

Commented [WPA7]: 9/10

Question 2.1 [maximum 5 marks]

Commented [WPA8]: 4/5 the answers to i) and ii) are not quite complete.

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?

[Type your answer here]

ANSWER:

i. Section 423 of the Insolvency Act, 1986: Transaction's defrauding creditors

In relation to a transaction at an undervalue, any individual who is a **victim** of the transaction may file an application as per **Section 423** of the Insolvency Act, 1986. Applicants do not have to be insolvency officeholders, and the firm does not have to be insolvent or in the course of a bankruptcy procedure. The **liquidator** or **administrator** will normally file the application if the firm is being wound up or is undergoing administration.

ii. Section 6 of the Company Directors Disqualification Act, 1986: Duty of court to disqualify unfit directors

As per **Section 7** of the Company Directors Disqualification Act, 1986, an application for a disqualification order under Section 6 of the Company Directors Disqualification Act, 1986 may be made by the **Secretary of State** if it appears to them, that it is expedient in the public interest that such an order should be made against any person. who is or has been a director of a business that is or has been wound up by the official receiver appointed by the court in England and Wales.

iii. Section 246ZB of the Insolvency Act 1986: Wrongful Trading: Administration

Sections 246ZB of the Insolvency Act, 1986 render insolvent business directors accountable for improper trade, making them responsible for part of the company's debts and obligations in certain circumstances, on an application by the **Administrator**.

Question 2.2 [maximum 5 marks]

Commented [WPA9]: 5/5

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

[Type your answer here]

ANSWER:

The following decision processes are provided as qualifying decision procedures under **Sections 246ZE** and **379ZA** of the Insolvency Act, 1986, through which a convener may seek a decision from creditors under the Act or these Rules, according to **Rule 15.3** of the Insolvency Rules 2016:

- a. **correspondence**; or
- b. **electronic voting**; or

- c. **virtual meeting**; or
- d. **physical meeting**; or
- e. **any other decision-making technique** that allows all creditors eligible to participate in the decision-making process to do so equitably.

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

Commented [WPA10]: 13/15

Question 3.1 [maximum 6 marks]

Commented [WPA11]: 6/6

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?

[Type your answer here]

ANSWER:

Obtaining or retaining necessary supplies is an important function that an administrator is tasked with and will have to do be performed a regular basis. Under **Section 233** of the Insolvency Act, 1986 (the "**Insolvency Act**") Suppliers are not entitled to demand payment of existing debts in order to obtain a new or ongoing supply to a company under administration. However, under **Section 233** of the Insolvency Act, a supplier might require the administrator to personally guarantee payment of the supply's charges.

Furthermore, the supplies referred to in **Section 233(2)** of the Insolvency Act include the following:

"....

- (a) a supply of gas by a gas supplier within the meaning of Part I of the Gas Act 1986;
- (aa) a supply of gas by a person within paragraph 1 of Schedule 2A to the Gas Act 1986 (supply by landlords etc.);
- (b) a supply of electricity by an electricity supplier within the meaning of Part I of the Electricity Act 1989;
- (ba) a supply of electricity by a class of person within Class A (small suppliers) or Class B (resale) of Schedule 4 to the Electricity (Class Exemptions from the Requirement for a Licence) Order 2001 (S.I. 2001/3270);
- (c) a supply of water by a water undertaker or, in Scotland,
- (ca) a supply of water by a water supply licensee within the meaning of the Water Industry Act 1991;
- (cb) a supply of water by a water services provider within the meaning of the Water Services etc. (Scotland) Act 2005;
- (cc) a supply of water by a person who has an interest in the premises to which the supply is given;
- (d) a supply of communications services by a provider of a public electronic communications service.
- (e) a supply of communications services by a person who carries on a business which includes giving such supplies;
- (f) a supply of goods or services mentioned in subsection (3A) by a person who carries on a business which includes giving such supplies, where the supply is for the purpose of enabling or facilitating anything to be done by electronic means."¹

¹ Section 233(2) of the Insolvency Act, 1986.

Section 233A of the Insolvency Act disables the supplier from depending on a "**insolvency-related clause**" in a contract of supply such an agreement if the company enters administration or a voluntary arrangement approved under **Part 1** takes effect in relation to the Company.

Furthermore, by adding **Section 233B** to the Insolvency Act, by the **Corporate Insolvency and Governance Act 2020** has now enhanced these safeguards for bankrupt businesses. This is in addition to **Section 233** and **233A** of the Insolvency Act, which **prohibits termination** by utility, communications, and IT suppliers. Sections 233, 233A, and 233B apply in the administration but also apply where a company has entered into a **company voluntary arrangement** or **restructuring plan**.

Section 233B of the Insolvency Act makes it illegal for a provider of goods or services to terminate or "do anything else" with a contract if the firm goes into official insolvency. Generally, when a firm becomes bankrupt, a clause of a contract for the delivery of products or services to the company is null and void. However, as per Section 233B of the Insolvency Act when a firm enters insolvency, a supplier is prevented from **terminating the contract** or "**do anything else**" as per the clause of the Contract. This Section also prohibits suppliers from making payment of pre-insolvent arrears a condition of continuing supply, as well as imposing other contract amendments.

However, on application to the court under **Section 233B** of the Insolvency Act, if the court is convinced that the continuance of the contract would cause the **supplier hardship**, the court might allow the supplier an exemption to terminate the contract.

Question 3.2 [maximum 9 marks]

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.

[Type your answer here]

ANSWER:

Creditors and shareholders are paid in the following order of priority in liquidations or administrations if a distribution is to be made:

- **Fixed Charge Holders:**
 - Fixed charge holders are compensated up to the value of the assets covered by the charge (**net of the costs of realising those assets**). The charge holder can claim the balance as an unsecured creditor if the value of the charged assets is less than the amount of the debt (**or under any valid floating charge in its favour**).
- **Administrators and Liquidators:** (*Section 115 of the Insolvency Act, 1986 (the "Insolvency Act" and Rules 6.42 and 7.108 of the Insolvency Rules, 2016)*)
 - Fees and costs of liquidators and administrators take precedence over those of preferred creditors and floating charge holders. subject to limits pertaining to specific costs that have not been authorised or approved by floating charge holders, preferential creditors, or the court in the event of liquidators.
- **Preferential Creditors:** (*Section 175 of the Insolvency Act*)

Commented [WPA12]: 7/9 a good answer which would have benefitted from further clear detailed information on one or two points eg. Fixed charges and preferential creditors.

- Preferential creditors as defined in Section 386 and 387 of the Insolvency Act are classified into two groups in the case of financial institution insolvency: **ordinary preferential debts** and **secondary preferential obligations**. These categories of Creditors are paid in full once the expenses of Liquidation and/or the Administrators are paid in full and before payment is made to Floating Charge Holders
- **Employees** with **labor-related claims** constitute the majority of preferential creditors; such as unpaid wages and contributions to occupational pension schemes.
- In any processes that begin on or after December 1, 2020, **HM Revenue and Customs** (“**HMRC**”) has been upgraded to secondary preference creditor status. This preferential treatment is limited to some taxes collected on behalf of HMRC by a corporation, such as VAT, pay as you earn, and employee National Insurance Contributions (NICs).
- **Floating Charge Holders: (Section 176A of the Insolvency Act)**
 - After the payment to preferential creditors have been duly made the next creditors in-line are the floating charge holders.
 - Holders of floating charges are paid up to the value of the assets covered by the floating charge. However, a portion of the earnings from the sale of assets subject to a floating charge that was generated on or after **September 15, 2003** must be set aside and made available to pay unsecured obligations (the “**Prescribed Part**”).
 - The Prescribed Part is computed as **50%** of the first **£10,000** in net floating charge realisations and **20%** of the remaining, subject to a ceiling of **£600,000** if the first ranking floating charge was generated **before April 6, 2020**, or **£800,000** if it was formed on or **after April 6, 2020**.
 - The stipulated portion shall not be allocated to floating charge holders until all unsecured creditors' claims have been met and a surplus exists.
 - If both the following conditions are fulfilled then the insolvency officeholder might **opt not to pay** the required percentage for the Prescribed Part:
 - the company's net property is less than **£10,000**; and
 - the officeholder believes the expense of making a distribution to unsecured creditors to be **disproportionate to the benefits**.
- **Unsecured Creditors:**
 - Creditors who do not have a **security interest** in the debtor's assets are known as unsecured creditors. After the secured and preferential creditors are paid off, the liability of these creditors are paid from whatever is left.
- **Interest:**
 - Interest on any unsecured obligations accrued after liquidation.
- **Shareholders:**

- Any **surplus** is distributed to the debtor's shareholders in accordance with the rights attached to their shares. These are paid if the firm has adequate finances to pay all of the creditors in the above-mentioned sequence.

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

Commented [WPA13]: 9/15

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 [WPA14]: 4/5 a reasonable attempt – the application to the facts might have been easier to follow. In such a detailed provision it is important to be clear about what you are stating. It is still a strong answer but the conclusion could have been explained in clearer, easier to follow language.

The floating charge in favour of Stercus Bank plc;

[Type your answer here]

ANSWER:

RELEVANT FACTS:

In the instant case Corfee Zero Limited ("the Company") was unable to pay its debts to Stercus Bank plc (the "Bank"). Consequently, the Company on February 2021 created a charge in form of debenture in favour of the Bank which created a floating charge over the whole of the Company's undertaking. The order of winding up petition was issued on 14th October 2021.

LAW APPLICABLE:

The Liquidator can seek protection under Section 245 of the Insolvency Act, 1986 (the "Insolvency Act")

Section 245 of the Insolvency Act declares certain floating charges automatically invalid if they were created within a specific time before the commencement of an administration or winding-up of the chargor, subject to certain exceptions. Floating charges are not invalid to the extent that they secure new value provided in the form of money, goods or services or a reduction (including a discharge) of a debt of the chargor.

The purpose of Section 245 of the Insolvency Act is to prohibit pre-existing unsecured creditors from getting the security of a floating charge just before a company goes into insolvency. It only applies to companies that are under administration or liquidation, and not to other forms of security. It invalidates floating charges issued by a corporation at a relevant period, unless "new" consideration is paid for the charge.

This "new consideration" must be given at the same time as or after the creation of the charge:

- 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.
- 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.

In the event of a linked party, the relevant time is within 2 years after the commencement of insolvency, and 12 months in the case of an unrelated party in whose favour the floating charge is generated.

ANNALYSIS:

Since in the instant case the charge is created by the Company towards its Creditor (the "Bank") in lieu of amount owed to the Bank it can fall within the domain of the Floating Charge avoidance. However, a charge is falls under the domain of Floating Charge under Section 245 of the Insolvency Act must stand the test under Section 123 of the Insolvency Act.

Considering the facts at hand it is unclear whether the same stands on the qualifying the conditions within the meaning in Section 123 of the Insolvency Act.

Accordingly It is pertinent to know whether the Company is indebted in a sum exceeding £750 and it has been more than 3 weeks that the due has served on the Company by the bank, or if the Court has held that the value of the Company's assets is less than the amount of its liabilities.

If a floating charge is captured by section 245, it is declared void, except to the extent of any "new consideration". There are two main categories of "new" consideration set out in section 245 of the Act, which, if satisfied, means a floating charge will not be invalid.

Accordingly It is pertinent to know whether the act of the Company in crating the floating charge in favour of the Bank was a consideration by way of discharge or reduction of a debt of the Company. As an be understood from the

However, the invalidity may only occur if the firm is placed into liquidation or administration. It has no bearing on anything done prior to the start of the winding up under the authority of the vulnerable fixating charge. The underlying debt remains valid despite the floating charge being nullified.

Question 4.2 [maximum 6 marks]

The sale of the coffee roasting machines; and

Commented [WPA15]: 5/6 again a strong answer which might have been improved by being more specific about the requirements of s 238 and how they apply on the facts.

[Type your answer here]

ANSWER:

RELEVANT FACTS:

In July 2021, the Company sold five coffee roasting equipment to Ann Young, one of its directors, for £10,000 in cash, after purchasing them for £25,000 a year earlier.

Furthermore, The winding up order was issued in response to a creditor's winding up petition on October 14, 2021.

LAW APPLICABLE:

The Insolvency Act allows some transactions entered into just before the company entered insolvency to be disputed as part of the Insolvency Act's underlying purpose of treating all unsecured creditors fairly and equitably.

A liquidator (or administrator) may oppose a transaction undertaken prior to the firm entering liquidation or administration if the transaction was at an undervalue, according to Section 238 of the Insolvency Act.

Section 238 of the Insolvency Act requires the liquidator or administrator to demonstrate that the company:

- made a gift to another person; or
- entered into a transaction with another person on terms that provided for the company to receive no consideration; or
- entered into a transaction with another person for a consideration which, in money or money's worth, was, at the date of the transaction, significantly less than the value, in money or money's worth, of the consideration provided by the company.

In order to be attacked, the transaction must have taken place at a "relevant time" which is in the period of two years prior to the commencement of the liquidation or administration.

ANNALYSIS:

It is important to note that whether the transaction was with a connected person or not, it is a requirement of liability under Section 238 of the Insolvency Act that the Company was unable to pay its debts as they fell due at the time the transaction was entered into or became unable to pay its debts as they fell due as a result of the transaction.

In the instant case it is clear that the transaction was with the connected person i.e. the Director of the Company. However, it is unclear whether the same was Company was unable to pay its debts as they fell due.

It's also worth noting that, until the contrary is proven, the Company is deemed to have been insolvent, or to have been insolvent as a result of the transaction, in the instance of a transaction with a related-parties.

As a result, unless the Director finds otherwise, the transaction will be classified as an Under Value Transaction.

If the court determines that a transaction was made at an undervalue or with a preference, it has the ability to issue an order returning the situation to what it would have been if the preference had not been provided or the transaction had not been made.

However, the court will not make an order under Section 238 of the Insolvency Act if the Director convinces 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 there were reasonable grounds for believing that the transaction would benefit the Company at the time it was entered.

Furthermore, Section 241 of the Insolvency Act, on the other hand, specifies that an order will not affect any interest in property purchased from a person other than the corporation in good faith and for value.

In the instant case it is clear that the transaction was not for value as the purchase was made for approximately 60% less value than the Market Value a year prior. However, whether the transaction was done in good faith or not is a question determinantal to be determined based on additional facts.

Question 4.3 [maximum 4 marks]

The payments to Beans and Leaves Ltd.

[Type your answer here]

ANSWER

RELEVANT FACTS:

The Director of the Company received an email from Beans and Leaves Ltd, one of the Company's important suppliers, a month before the winding up order was issued. The supplier requested immediate payment of all outstanding balances and warned the Company that all future deliveries would be done exclusively on a cash-on-delivery basis. Because the Company considered the continuous supply of coffee beans to be critical, the board approved a payment of £8,000 to settle outstanding liabilities.

LAW APPLICABLE:

Section 239 of the Insolvency Act relates to preferences that may be avoided by a liquidator or administrator. The underlying purpose of Section 239 of the Insolvency is to prevent a company placing one of its creditors in a better position than others. It prevents such preferences such as a payment in full where the creditor could have expected only a dividend as an unsecured creditor.

An application under Section 239 of the Insolvency Act must show that the person whom it is alleged has been preferred was a creditor of the company at the time of the transaction. An application may be made only if the company has gone into liquidation or administration.

ANNALYSIS:

In the instant case the transaction between the Creditor and the Company took place a month before the winding up order. Furthermore,

Commented [WPA16]: 0/4 unfortunately, s 239 cannot apply as the winding up has commenced. Only s 127 is relevant here.

The act of Company in paying £8,000 to settle outstanding liabilities and further payment of £3,000 up to the date of the winding up order could be said to be preferential transaction if it falls within the framework Section 239 of the Insolvency Act. It is clear from the above fact that the transaction was between Company and its Creditor and took place a month before the winding up order i.e. qualifying the time limitation set under Section 239 of the Act.

However, the Section 239 of the Insolvency Act shifts the burden of proof on the officeholder in connection to each of the following issues. If the person to whom the preference was given is related to the firm (other than as a corporate employee), then there is a presumption that the Corporation was affected by a wish to prefer that individual. This places the onus on the related individual to disprove the supposition.

Since in the instant case the transaction happened between Creditor of the Company and the Company i.e. the Debtor this presumption is not applicable. Consequently, the officeholder i.e. the Liquidator in the instant case has to show that the transaction was preferential in nature as per terms of Section 239 of the Insolvency Act and would have to prove that there exists a desire in doing so.

The fact that the creditor exerted pressure is irrelevant in establishing whether the action amounted to a preference. Only the presence of the required desire is considered while establishing pressure.

Additionally, the fact that the Company was in the process of being wound up and the Creditor's dues were not only cleared, but also paid ahead of schedule, proves conspiracy and intention. However, they are insufficient to establish the desire which is a prerequisite under Section 239 of the Insolvency Act.

*** End of Assessment ***