



**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% a good effort which shows a good overall grasp of the law.

Commented [WPA2]: 8/10

(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.

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- (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.

Commented [WPA4]: A is correct

**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]**

**Question 2.1 [maximum 5 marks]**

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?

Answer: Section 423 of the Insolvency Act, 1986

This section lists out the name of the parties who can file an action for transactions which have been undertaken with the intention to defraud creditors and thus includes the office bearers when the company is in resolution period or wound up period and includes administrator, official receiver, liquidator or in fact any victim of the transaction such as the creditor. The second point also gives power to any victim who has been bound by Creditors Voluntary Arrangement and thus even the Supervisor of CVA or any victim of the transaction (whether bound by CVA or not). The third point refers to the otherwise victim of the transaction who can seek remedy under the section.

There are two requirements before the concerned persons can take action under this Section as then petitioners have to prove that the company entered the transaction with another person at undervalue i.e. the company has either made gift to another person, or received no consideration or significantly less consideration. The second condition is that the particular transaction has been entered with the intention to put the assets of the company beyond the reach of creditors or any present or future claimant or is otherwise prejudicial to the interests of any claimant etc.

After these requirements are met, The petitioner is set to go. It is imperative to note here that no time-limit is set for consideration for such transactions and the wide catena of applicants is the actually adding the substance to the provision. The application even though made by a single person is considered for the benefit of whole class of persons.

Section 6 of the Company Directors Disqualification Act, 1986

This Section basically includes the provision for disqualification of Directors in the basis of the unfitness of the position. The Court shall make the order of disqualification only when it is satisfied that the person is or has been a director of the company which has at any time become insolvent (whether while he was a director or subsequently) and that his conduct as a director of that company (either taken alone or taken together with his conduct as a director of one or more companies or overseas companies) makes him unfit to be concerned in the management of the company.

The cases covered under this Section are based upon the idea that Directors have been carrying on with activities of trading whilst being insolvent and therefore often imputed with the allegation that the money has been used for their unjust enrichments at the hands of the Company or the creditors and thus entered into fraudulent activities which might include offering preferential treatment to connected parties and other circumstances.

Some discretionary power of qualification is also granted to Courts in cases of indictable offences in Great Britain or overseas or default in the provisions of the companies' legislation or guilty of fraudulent trading or guilty of any breach of duty or alleged unfitness for carrying out the management of the Company or where declaration demanded to make contribution to company's assets etc. Sufficient jurisprudence exist to decide on the quantum of punishment or penalty to be offered under this section as the penalty varies from two to fifteen years.

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Commented [WPA6]: 3/5 the answer to i) is correct – the answers to ii) and iii) do not address the question. The answers are simply ii) Sec of State and OR and iii) administrator.

## SECTION 246 ZB of the Insolvency Act 1986

This Section talks about wrongful trading and is to be read in complementary to Section 14 of the Act. These provisions may be availed by Liquidator but not the creditor or contributory as Section 214 specifically states this. But this is important to note that effectively these provisions can also be availed by insolvent companies. The grounds that need to be satisfied for making an application to wrongful trading mandates that the company has gone into insolvent liquidation and at some point before the commencement of these proceedings, the person knew or ought to have concluded that there was no reasonable prospect of avoiding the going into insolvent liquidation and at that relevant point of knowledge or conclusion, the person was acting as a director of the company.

Thus the knowledge or imputation of conclusion is important and the only defence that the director could take is to show that he took every possible step to the best of his knowledge, expertise and skill to minimise the probable loss to the company which includes taking legal advice or acting upon such advice or voluntarily filing the company for liquidation etc. Though the initial burden to prove that about the knowledge of conclusion is upon the liquidator and once that is fulfilled, director is required to take all the available defence.

Section 214(4) also talks about the subjective and objective tests for determining the liability of the Director in these cases and the Director is required to have a general minimum standard of knowledge, skill and expertise for being qualified to this designation and the test is including the subjective criteria to ensure that the Director of the company with high scale operations will require to perform more sophisticatedly. The court may accordingly grant an award for the directors to compensate the company to make good the losses incurred.

### Question 2.2 [maximum 5 marks]

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

*Answer:* Under Insolvency Act 1986, Section 245ZE(1) talks about the power of the convenor to seek a decision on any matter from company's creditors or contributories. The physical creditors meeting is not held by default and therefore all decisions are taken by Decision Procedures which includes either the Deemed Consent Procedure or the Qualifying Decision Procedure. The deemed Consent Procedure can be generally adopted but in cases where it is statutorily prohibited like fixing the basis of the office-holder's remuneration or where the procedure is effectively objected to or where the office holder does not deem it fit, the Qualifying Decision Procedure may be then used.

The details of rules are enshrined in Rule 15 of the Insolvency Rules 2016 which talk about five major Qualifying Decision Procedures 1) Correspondence 2) Electronic Voting 3) Virtual Meeting 4) Physical Meeting 5) any other decision making procedure which will enable all creditors to participate effectively in decision making process.

Rule 15.4 talks about necessary mandates to be carried out during Electronic Voting and equip the creditor with sufficient information required for accessing the Voting system along with providing him flexibility for any-time voting. It is specifically stated that no information shall be shared in relation to the vote cast by other creditors during the course of voting process. Rule 15.5 states that information for virtual meetings must refer the statement for suspension or adjournment of such virtual meeting and the decision may then accordingly be taken as per the resolution taken at the meeting. Necessary information in relation to the access of voting platform also includes any telephone number or the password.

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Rule 15.6 enumerates that physical meeting may be convened upon the request made to the convenor within prescribed timeframe and must meet the statutory thresholds mentioned in 246ZE(7) and 379ZA(7) to ensure that the prescribed proportion of creditors are in favour of physical meeting. The meeting's notice must be sent within prescribed time-limit of three days and in the prescribed format mentioned in Rule 15.8 of insolvency Rules 2016 and shall contain the statement in relation to the adjournment or the suspension of the meeting. The reference to the supersession of the Deemed Consent Procedure or the original Consent Procedure must be made in such notice. Also, the notice must include the provision of remote attendance for any creditor provided the approval of same must be obtained from the convenor in advance.

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

**Question 3.1 [maximum 6 marks]**

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?

*Answer:* The administrator is duty bound to keep the Company as a going concern so that the company may be rescued with the retention of all or material part of the business. Generally, the terms of supply contracts refer to the automatic termination upon the Company's insolvency in contrast to the general mandate of the statute. The administrator's appointment sets the invocation of such ipso facto clauses and therefore the supplies of many essential goods and services then gets disrupted. This defect has been statutorily cured worldwide as many exceptions have been carved out for making such clauses void to ensure that the efficient supply of goods and services is maintained during the administration of the Company. UK insolvency accordingly amended the relevant sections and Section 233 specifically talks about the supply of gas, electricity, water and communication services including point of sale terminals, computer hardware, software information, advice, technical assistance, data storage etc. Suppliers are prohibited to demand the pre-insolvency outstanding debts in order to secure a new or continued supply to the company in administration. The suppliers have been statutorily guaranteed for payments of charges in respect of the supply made during the administration and this guarantee may be personally stipulated by administrator of Company as mentioned in point 2(a) of the Section. Also, the guarantee may be demanded within the time frame of fourteen days to protect the interests of suppliers.

It is also ensured under Section 233A that in order to instil confidence of such payments, the Suppliers are free to alter the terms of supply and may even compel for higher payments for continues supply. This balancing of interests is a unique feature of the UK laws which ensure that continued supply shall not hurt the sentiments if local market at the same time.

Section 233B is yet another resourceful provision which is introduced by CIGA 2020 Act and prohibits the Supplier to "terminate" or "do any other thing" in a contract for a company in administration. This "other thing" includes the prohibition on conditionalizing of clearance of outstanding dues for continued supply. The supplier has been cushioned enough in this clause as may seek permission from administrator or court of the continued supply will cause excessive hardship to him. There has been certain list of suppliers appended to this clause which have been exceptionally excluded from such prohibitions and include insurers, bankers, electronic money, recognised investment exchange etc. This is certainly important to mention here that these provisions have not been restricted to mere administration and even finds its application in cases of Creditor's Voluntary Arrangement, Moratorium or a Restructuring plan or even liquidation.

**Commented [WPA8]:** 12/15

**Commented [WPA9]:** 5/6 generally sound but the explanation of s 233A seems not to be entirely accurate.



**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.

**Answer:** Liquidation refers to the terminal procedure where Company is dissolved and wound up because of its inability to pay debts generally. The process is circumscribed within the idea of collection and distribution of assets of the Company and also involves the investigation into the affairs of the Company for any suspicious transactions. It may be Voluntary or Compulsory in nature depending upon the type of invocation. Voluntary Liquidation involves mostly out of court procedure and Winding up by Court necessarily involves the Court's intervention and High Court or the country Courts are equipped with such jurisdictions in United Kingdom.

Section 123 of Insolvency Act talks about Balance Sheet or Cash Flow Insolvency and mentions the ground on which such petition may be decided and the court may accordingly admit/dismiss/adjourn/make any other interim orders in this context of liquidation. The moment the petition is admitted, liquidation is commenced with the appointment of Liquidator and therefore the entire process of realising the assets and distributing them to the original claimants is set in motion. For easing the tasks of the Liquidator, certain sections ensure that that no more creditors or attachments orders or execution orders etc. bring in the proceedings. Liquidator takes the of the Company, calls out for the claims, prepares the list of creditors, the decision procedures are set and then the realisation of assets commences.

It is to be noted here that only such assets may be realised which have been legally vested in the name of the Company and therefore, debts assigned to receivables financier or assets subject to hire-purchase or retention of title contracts are specifically excluded from the liquidation estate. Section 115 talks about the payments which are to be paid in priority over the preferential creditors or any holders of floating charges or the unsecured creditors.

**1. Expenses of Winding up including the liquidator's remuneration(Section 115) :**

It includes expenses incurred by liquidator in preserving, realising etc., cost of any security, amounts payable for preparation of statements, necessary disbursements, remuneration to employed persons and the liquidator itself, corporation tax and other incidental expenses relating to the liquidation.

It is to be considered noteworthy here that the remuneration to liquidator lies behind a number of categories of expenses which illustrates that the certain payments and certain creditors are prioritised as such creditors are to be assured payments in sanctity of the process. They are to be repaid with utmost urgency and therefore stand in front of the preferential creditors as they have been assisting in carrying out the liquidation process as a whole.

**2. Preferential Creditors, as defined in Section 386,387 and Schedule 6: Section 175**

There are two types of preferential debts in this category: Ordinary and Secondary and the same have been enumerated in Schedule 6 of the Act.

Ordinary Preferential Debts include sum owed on account of employee's/employer's contribution to occupational pension scheme, remunerations due to employees or ex-employees, amounts accrued due to holiday- remuneration, claims for money advanced to pay wages or holiday remunerations, levies on the production of coal and steel, claims which are ordered to be paid under Reserve Forces(Safeguard of Employment Act,1985) and so much of the amount owed by the company in respect of an eligible deposit as does not exceed the compensation payable under the Financial Services Compensation Scheme.

Secondary Preferential Debt include so much of the amount owed by the company to one or more eligible persons in respect of an eligible deposit as does not exceed the compensation payable under the Financial Services Compensation Scheme, amount owed by the company to one or more eligible persons in respect of the deposits as mentioned in point 10 of Schedule

**Commented [WPA10]:** 7/9 good but some more detail would have been helpful on fixed charge priority and the financial limit of s 176A

6, PAYE income tax deductions, national insurance deductions, VAT payments, Construction Industry Scheme Deductions and student loan repayments.

Preferential creditors have always remained prioritized in all proceedings and therefore are always paid first before the floating charge holders. As mentioned above, it includes limited claims of employees and some taxation liabilities and therefore employees are afforded the most extensive protection under this regime as the contributions to pension funds are prioritised under this part. The debts due to the crown have found a fluctuating position the UK insolvency laws as prior to 2002, they were considered preferential only 2020 as the position seem to have been altered by Finance Act, 2020. It can be safely stated that the overall sanctity of preferential payment has been well preserved in this regime.

### 3. Floating Charge Holder and “Prescribed part”

After making payments to preferential creditors, Floating charge holder are disbursed and in case of multiple holders, the creditor whose charge was first created in time would be preferred. Liquidator is bound to see if the floating charge holder was created on or after 15 September 2003 and accordingly check first if Section 176A is applicable in such case.

First and foremost, The “prescribed part” is to be set aside by the Liquidator for the satisfaction of unsecured debts before allocating the net property to floating charge holders. The particular rule for allocating of prescribed part varies when the net property is less than 10,000 or above 10,000. A floating charge holder who may have an outstanding balance is not permitted to participate in the distribution of prescribed part.

### 4. Unsecured Creditors

The trade creditors are afforded no security general trade related transactions and are therefore paid last in the priority list. Generally nothing is left to be paid after making payment towards liquidation expenses and preferential creditors.

### 5. Shareholders

Lastly, the shareholders are paid just in case anything surplus because generally after making all priority payments of the above list including the interest on debt, nothing remains and this pro-rata distribution is just for theoretical purposes.

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

Commented [WPA11]: 9/15

Prior to going into compulsory liquidation on 23<sup>rd</sup> 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 14<sup>th</sup> 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]**

The floating charge in favour of Stercus Bank plc;

Answer 4.1

The Corfee Zero Limited ("Company") was faced with Liquidation order on 23rd December 2021 and the Creditor's winding petition was filed on 14th October 2021 and thus Liquidation shall be deemed to have commenced from the date of petition itself i.e. 14th October 2021. The effect of this date would be in relation to the prevention of creditors from taking or continuing any legal action against the Company without the permission of the court. Now the Liquidator has got the assets in his control and enjoys scattered powers throughout the law for effective realisation and distribution of the property of the Company. For the recovery of the same, he can carry out number of actions to invalidating the transactions entered into prior to the formal procedures of insolvency.

Since the transaction seem to protect the pre-existing unsecured creditors by granting of debentures by the Company shortly before the commencement of proceedings. Section 245 of the Act is what can be resorted to by the Liquidator herein. The Company in order to evade the administration/liquidation proceedings has attempted to issue debentures in the favour of the Stercus Bank plc in February 2021 which contain the floating charge over the whole of the Company's undertaking. This situation is perfectly fit to taking an action under section 245 of the Act as the said transaction has been carried within 12 months from the date of commencement of formal procedures.

This section can be used by the Liquidator to invalidate the said floating charge and since nothing appears on the face that new consideration is provided for the charge and thus, the grounds of retaining the validity of the floating charge in favour of the Bank seem to be a distant point. Since no fresh funding is provided by the Bank by securing the said floating charge, the transaction is clearly vulnerable and can be easily attacked to by the Liquidator.

Since the charge was issued in consequence of avoiding the insolvency procedure and thus the financial health of the Company being unsound at the relevant time, this opens up the ground under this section and the transaction also does not fall under the category of "new Consideration" which might bring out the validity of the charge in favour of the holder. It is to be noted herein that only the charge gets invalidated here and the underlying debt remains a valid one.

**Commented [WPA12]:** 4/5 good but it might have been helpful to lay out the requirements of s 245 more explicitly.

**Question 4.2 [maximum 6 marks]**

The sale of the coffee roasting machines; and

**Answer 4.2**

The Coffee Roasting machines which were bought just a year ago for 25000 was approved for sale to one of the Directors, Mr. Ann Young for 10,000 in cash. The Liquidator can see if the transaction has been undertaken at undervalued price and thus apply under Section 238 of the Act as the transaction was entered prior to the company entering liquidation and for a consideration which, in money, or money's worth, was, at the date of transaction, significantly less than the value, in money, or money's worth, of the Consideration provided by the Company. Since the transaction has taken place between the "relevant period" of two years prior to the commencement of the liquidation as the sale happened 1 July 2021 and thus all the necessary ingredients are fulfilled in this Section 238. The directors and the connected persons would need to prove to the satisfaction of the court here that they had reasonable grounds for undertaking the said transaction for the benefit of the company.

Also, since the transaction here is entered into with a connected person, there is one good presumption in favour of the liquidator that company would be presumed to be insolvent as on the date of transaction here or presume to have become insolvent as a result of the transaction and thus the onus of proof is simple here and the contrary would have to be proved by the Director, Mr. Ann young. The court can make an order to restore the position to what it would have been if the transaction had not been entered into. Certain protections are also afforded in Section 241 of the Act however, such shall not be attracted in this case.

**Question 4.3 [maximum 4 marks]**

The payments to Beans and Leaves Ltd.

**Answer 4.3**

Payment to Beans and Limited who is one of the key suppliers/creditor of the Company has got the payment released by writing down the threatening mails for suspending the further Supply to the Company. He got two types of payments- First 8000 for existing outstanding supply and further payment of 3000 for security towards further payments. Here, The further payment of 3000 is directly in contravention of Section 233B of the Act as the supplier now cannot terminate or "do any other thing" in relation to the contract if the company enters a formal insolvency procedure. Here, the Beans and Leaves Limited cannot out forth the condition of further payments for ensuring the regular supply.

This basically include preferential transactions under Section 239 of the Code as shortly before the winding up order was to be made, the board resolution was passed for placing the Creditor Beans and Limited in a better position than others.

**Commented [WPA13]:** 5/6 again a good answer but it would benefit from explicit explanation of the requisites for s 238.

**Commented [WPA14]:** 0/4 unfortunately as the winding up has already commenced there can be no action under s 239. The issue here was how s 127 applies.

It is sufficient to state here that the said beans and limited was a creditor of the company and because of that board resolution and the threatening mail, it had the effect of putting the creditor in a better position, in the event of the Company going into insolvent liquidation, than the position this creditor would have been if such resolution has not been passed. Also, the preference being given in the relevant time only.

The only difficulty that may arise here would be establishing the desire to prefer the particular creditor. Since beans and Limited might have been preferred out of the commercial considerations only and specifically to ensure the continued trading, the desire to prefer might be difficult to establish the liability under Section 239 of the Act but since the desire to prefer is presumed unless the contrary is shown in case of connected persons and this case does fall within this presumption and thus Liquidator will have to prove the case to his favour with string evidences. One of the evidences that might be used here is the mail to Mr. Ann Young specifically, who might want to escape the liability as certain undervalue transactions had already been carried out by him in the relevant period and he simply want to put the time off and delay the process so that he can escape the trap. This way the liability might be fastened and ground may be created by the Liquidator.

**\* End of Assessment \***