



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

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Well done!

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

Commented [JL2]: 9 out of 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.

Commented [JL3]: b

- (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 [JL4]: 10 out of 10

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?

- (i) Section 423 of the Insolvency Act 1986 ("IA") relates to transactions defrauding creditors. Those who may bring an action thereunder are (see section 424 IA):
 - (a) Where the debtor company is being wound up or is in administration, the official receiver, the liquidator or the administrator (with the leave of the court) or a victim of the transaction;
 - (b) Where a victim is bound by a corporate voluntary arrangement (CVA), the supervisor of the CVA or a victim of the transaction (whether or not bound by the CVA); or
 - (c) In any other case, a victim of the transaction.

Victim of the transaction refers to a person who is, or is capable of being, prejudiced by the transaction (see subsection 423(5) IA).

- (ii) The Secretary of State may bring an action under section 6 of the Company Directors Disqualification Act 1986.
- (iii) The administrator may bring an action under section 246ZB IA, which relates to action for wrongful trading.

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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.

The qualifying decision procedures are set out in rule 15.3 of the Insolvency Rules 2016. The 5 prescribed qualifying decision procedures are:

- (a) correspondence;
- (b) electronic voting;
- (c) virtual meeting;
- (d) physical meeting; or
- (e) any other decision making procedure which enables all creditors who are entitled to participate in the making of the decision to participate equally.

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

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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?

An administrator who wishes to continue to operate the business of the company in administration may require the continued supply of essential goods and services of gas, water, electricity and communications services under section 233 of the Insolvency Act 1986 (IA).

This includes the supply of goods and services of point of sale terminals, computer hardware and software, information, advice and technical assistance in connection with the use of information technology, data storage and processing and website hosting (subsection 233(3A) IA). The supplier may make it a condition of the giving of the supply of the goods and services that the administrator personally guarantees the payment of any charges in respect of the supply, but cannot make it a condition (or do anything to that effect) that any outstanding charges be paid in respect of a supply given to the company before the company entered into administration.

Further, section 233A IA provides that an insolvency-related term of a contract for the supply of essential goods or services (i.e. a contract for a supply as covered in section 233(3) IA) would generally cease to have effect upon the company entering administration. This would prevent a supplier from terminating the supply, varying the supply terms or requiring higher payments for continued supply. The supplier may still terminate the contract if the administrator consents to the termination, the court grants permission for termination, charges for the supply incurred after the company entered into administration are not paid within 28 days from due date, or where the administrator fails to give guarantee of payment for continuation of supply.

Finally, section 233B IA provides that clauses which entitles:

- (a) a contract for the supply of goods and services to be terminated; or
- (b) a supplier of goods or services to terminate or do any other thing to the contract

if the company is subject to a formal insolvency procedure (including administration), will cease to have effect when the company enters into the formal insolvency procedure. The supplier may still terminate the contract if the administrator or the company consents to the termination (as the case may be), or where the court grants permission for the termination if it is satisfied that the continuation of the contract would cause the supplier hardship.

Unlike the specific goods and services in sections 233 and 233A, section 233B IA applies to all suppliers except where specifically excluded or exempted. Such exclusions include insurers, banks, electronic money institutions, investment banks and investment firms, payment institutions, operators of payment systems and infrastructure providers, recognised investment exchanges, securitisation companies and overseas activities (see schedule 4ZZA of IA).

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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.

Assets realized outside formal insolvency procedure

At the outset, the liquidator will not be entitled to realise book debts which have been sold and effectively assigned to a receivables financier, or assets which are subject to hire purchase or retention of title contracts or other similar arrangements where the creditor has legal ownership of the asset until it is fully paid for. These assets are owned by the receivables financiers and hire purchase creditors, and will usually be possessed by the creditors and realised outside the formal insolvency procedure when the company is insolvent.

In a liquidation, holders of fixed charges will be paid first usually outside of the formal insolvency procedure.

Expenses incurred in winding-up

Payment for expenses incurred in the winding-up will have priority to all other claims (section 115 of the Insolvency Act (IA), and rules 6.42 and 7.108 of the Insolvency Rules 2016). The expense of winding-up include the following payable in the below order of priority:

- (a) expenses that are properly chargeable or incurred by the liquidator in preserving, realising or getting in any assets of the company in the preparation, conduct or assignment of any legal proceedings;
- (b) cost of any security provided by a liquidator;
- (c) costs of the petitioner;
- (d) any amount payable to a person employed or authorised to assist in the preparation of a statement of affairs or of accounts;
- (e) any necessary disbursements by the liquidator in the course of the administration of the winding-up (including any expenses incurred by members of the liquidation committee);
- (f) remuneration or emoluments of any person employed by the liquidator to perform any services for the company;
- (g) the remuneration of the liquidator;
- (h) the amount of corporation tax on chargeable gains accruing on the realisation of any assets of the company; and
- (i) any other expenses properly chargeable by the liquidator in carrying out the liquidator's functions in the winding-up.

Preferential Debts

After expenses incurred in the winding-up are paid, preferential creditors will be next in priority. Schedule 6 of the IA sets out the preferential debts as follows:

- (a) any sum owed on account of any employee's contribution to an occupational pension scheme, being contributions deducted from earnings of the company's employees paid in the 4-months' period prior to commencement of winding-up;
- (b) any sum owed by the company on account of an employer's contribution to an occupational pension scheme in the 12-months' period prior to the relevant date;
- (c) remuneration owed by the company to an employee or ex-employee of the company which is payable in respect of the whole or any part of the 4-months' period prior to commencement of the winding-up, up to a maximum amount of £800;
- (d) any amounts owed by the company for accrued holiday remuneration for any period of employment prior to the winding-up. Remuneration payable in respect of a holiday period or absence from work through sickness or other good cause, is deemed as wages;
- (e) claims for monies advanced to pay wages or holiday remuneration will be preferential;

- (f) levies on production of coal and steel in Articles 49 and 50 of the European Coal and Steel Community Treaty;
- (g) claims for any amount ordered to be paid by the company under the Reserve Forces (Safeguard of Employment) Act 1985;
- (h) any amount owed by the company in respect of eligible deposits as does not exceed the compensation payable in respect of the deposit under the Financial Services Compensation Scheme to the person(s) to whom the amount is owed;
- (i) any amount owed by the company to one or more eligible persons in respect of an eligible deposit as exceeds any compensation payable in respect of the deposit under the Financial Services Compensation Scheme to that person(s);
- (j) an amount owed by the company to one or more eligible persons in respect of a deposit that (i) was made through a non-UK branch of a credit institution authorised by the UK competent authority; and (ii) would have been an eligible deposit if it had been made through a UK branch of that credit institution;
- (k) PAYE income tax deductions, national insurance deductions, VAT payments, Construction Industry Scheme deductions and student loan repayments.

Items (a) to (h) are ordinary preferential debts and are paid in priority to the debts in items (i) to (k), which are known as secondary preferential debts (see section 386 IA).

Floating charge holder

After preferential creditors, creditors who are floating charge holder will be next in priority. A floating charge is a security which only crystallises into a fixed charge upon the occurrence of specific agreed events (such as the insolvency of the company). If there are more than one floating charge holder, then first in time prevails and the floating charge created earlier will have priority.

However, payment to the debt of the floating charge holder is subject to section 176A of IA, which applies to a company in liquidation with a floating charge created on or after 15 September 2003. Under section 176A IA, the liquidator shall make a prescribed part of the company's net property available for satisfaction of unsecured debts, and shall not distribute that prescribed part to the floating charge holder except in so far as it exceeds the amount required to satisfy the unsecured debts. The company's net property in this case is the amount of the company's property that would be available for satisfaction of claims secured by floating charge if not for section 176A i.e. less the amount of winding-up expenses and preferential debts.

The prescribed part is calculated as follows, as set out in the Insolvency Act 1986 (Prescribed Part) Order 2003:

- (a) Where the company's net property does not exceed £10,000 in value, 50% of that property;
- (b) Otherwise, 50% of the first £10,000 in value and 20% of the part of the company's net property which exceeds £10,000 in value, but shall not exceed £800,000.

The requirement to make the prescribed part does not apply where the company's net property does not exceed £10,000 and the liquidator thinks the cost of making a distribution to unsecured creditors would be disproportionate to the benefits. Besides that, the requirement

also shall not apply if the liquidator applies for an order, and the court orders, that the cost of making a distribution to unsecured creditors would be disproportionate to the benefits.

Unsecured creditors

After floating charge creditors, next in terms of priority of payments are the unsecured creditors of the company. Unsecured creditors are essentially creditors of the company which do not have any form of security, and are usually the ordinary trade suppliers and non-preferential taxation liabilities.

Members of the company

Finally, if the company has any surplus assets after settling all of its liabilities, that surplus will be paid to the members of the company according to the rights set out in the company's constitution.

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

Commented [JL10]: 11 out of 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]

The floating charge in favour of Stercus Bank plc;

The liquidator may apply to avoid the floating charge granted by the Company in favour of Stercus Bank plc pursuant to section 245 of the Insolvency Act (IA). Section 245 IA provides for avoidance of floating charges where pre-existing unsecured creditors obtain a floating charge shortly before the company goes into a formal insolvency procedure (including liquidation). This provision applies:

- (a) Where the floating charge is created in favour of a person connected with the company within the 2-year period prior to onset of insolvency;
- (b) Where the floating charge is created in favour of a person not connected with the company, within a 12-month period prior to onset of insolvency, provided the company was either unable to pay its debts (within the meaning of section 123 IA) or becomes unable to do so in consequence of the transaction.

On the facts, there is nothing to show that Stercus Bank plc is connected with the Company. In any event, the creation of the floating charge in favour of Stercus Bank plc (in February 2021) is still within the 12-months' period prior to the commencement of winding-up on 14 October 2021 required for purposes of section 245.

Under section 245 IA, the floating charge will not be invalid to the extent of any new consideration that is provided for the floating charge. New consideration is:

- (a) The value of so much of the consideration for the creation of 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 of any debt of the company, at the same time as or after the creation of the charge; and
- (c) The amount of such interest (if any) as is payable on the amount falling within (a) and (b) above pursuant to any agreement under which the money was so paid, the goods or services so supplied, or the debt so discharged or reduced.

Here, unless there is new information, it does not seem that there was any new consideration for the creation of the floating charge in favour of Stercus Bank plc.

Even if the floating charge is invalid under section 245 IA (save to the extent of any new consideration), the underlying debt owing to Stercus Bank plc remains valid. Anything already done under the authority of the floating charge also remains valid.

While section 245 IA deals specifically with avoidance of floating charges, the liquidator may also take action pursuant to section 239 IA if the creation of the floating charge was motivated by a desire to prefer Stercus Bank plc by putting it in a better position than it would have been in liquidation if not for the creation of the floating charge. However, this requirement for section 239 IA to show the desire to prefer is harder to prove, and it is advisable that the Company's liquidator should therefore take action under section 245 IA instead.

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Question 4.2 [maximum 6 marks]

The sale of the coffee roasting machines; and

The liquidator may take action in respect of the sale of the coffee roasting machines pursuant to section 238 IA in relation to transactions at an undervalue. Under section 238 IA, a transaction at an undervalue is where the company makes a gift to another person or otherwise enters into a transaction with another person that provide for the company to receive

no consideration, or the company enters into a transaction with another person for a consideration (in money or money's worth) which is significantly less than the consideration (in money or money's worth) provided by the company. In this case, the coffee roasting machines was sold for £10,000 only, which is significantly less than the consideration of £25,000 paid by the Company for the machines one year ago. The sale of the coffee roasting machines therefore amounts to a transaction at an undervalue for purposes of section 238 IA.

For purposes of an action under section 238 IA, the transaction in question must be within the relevant time of 2 years prior to the commencement of the liquidation. This requirement is satisfied as the sale of the coffee roasting machines was in July 2021, well within the 2 years before the commencement of the winding-up of the Company on 14 October 2021.

Further, for an action under section 238 IA, it must be shown that the company was unable to pay its debts as they fell due or that it became unable to pay its debts (within the meaning of section 123 IA) as a consequence of the transaction in question. However, where the transaction is with a connected person, there is a presumption that the company is insolvent or has become insolvent as a consequence of the transaction, unless proven otherwise. Persons connected with a company would include a director of the company (section 249 IA). On the facts, the sale of the coffee roasting machines was to Ann Young, a director of the Company. As such, the presumption applies and the onus will be on Ann Young to prove the contrary.

If all the requirements are met, the court may 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. The court has power to make a variety of orders, including requiring any property in the transaction to be vested in the company (see section 241 IA).

However, the liquidator should note that the court shall not make an order in respect of a transaction at an undervalue if it is satisfied that the company entered into the transaction in good faith and for the purpose of carrying on its business, and that there was reasonable grounds for believing that the transaction would benefit the company at the time it did so. On the facts, it appears that the Company was having cash flow problems at the time of the sale of the coffee roasting machines (which was sold in cash) and the court may be satisfied that the Company had sold the machines in good faith for purpose of dealing with its cash flow problems to carry on its business.

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Question 4.3 [maximum 4 marks]

The payments to Beans and Leaves Ltd.

The liquidator may apply to avoid the payments to Beans and Leaves Ltd pursuant to section 239 IA, which relates to preference for a creditor. Section 239 IA enables the avoidance of a transaction which places a creditor in a better position than others shortly prior to the company entering a formal insolvency procedure (including liquidation).

For an order under section 239, it must be shown that:

- (a) The person alleged to be preferred was a creditor of the company at the time of the transaction. Here, Beans and Leaves Ltd was a supplier which was owed money by the Company for supplies already provided at the time of the payment;
- (b) Something was done by the company which had the effect of putting the person in a better position in liquidation, than that person would have been if that thing had not been done. Here, the Company authorised the payment to Beans and Leaves Ltd for

the existing debt of £8000 and a further £3000 for supplies up to the winding-up of the Company. As a result, Beans and Leaves Ltd received payment in priority for the debt owing to it, when it should be ranked as an unsecured creditor in liquidation;

- (c) The company was influenced by a desire to produce the effect of preferring the person preferred in doing the transaction. This means that there must be an intention to prefer that creditor, and not a desire to avoid the calling of the debt or to have continuation of trading (with reference to guidance in the case of *Re MC Bacon Ltd*)¹. There have been caselaw which held that were the company was influenced solely by commercial considerations to ensure the continuation of trading by the company, this does not amount to a desire to prefer the creditor.

If the creditor preferred is connected with the company, there is presumption that the company is influenced by the desire to prefer and it is for the connected person to rebut the presumption. It does not appear that Beans & Leaves Ltd is a person connected to the Company on the available facts, so the burden will be on the Company's liquidator to prove this requirement.

Here, Beans & Leaves Ltd is a key supplier of the Company. As it seems that the payment to Beans & Leaves Ltd was authorised on the basis that the supply of the coffee beans was essential to the Company's continued trading, it does not seem that this requirement would be fulfilled on the facts of this case. Although Beans & Leaves had applied pressure to the Company that continued supply must be on cash on delivery basis and demanding payment for existing liabilities, such pressure is irrelevant for section 239 if there is no desire by the Company to prefer Beans & Leaves Ltd.

- (d) The preference was given at the relevant time which is:

- (i) If a connected person is preferred, within 2 years prior to onset of insolvency;
or
- (ii) If a person not connected to the company is preferred, within 6 months prior to the onset of insolvency.

As Beans & Leaves Ltd does not appear to be connected to the Company, the relevant time is 6 months prior to the commencement of winding-up on 14 October 2021. This requirement is fulfilled as the payments were within the 1 month prior to the commencement of winding-up.

Further, for purposes of section 239 IA, it must be shown that the company was unable to pay its debts as they fell due (within the meaning of section 123 IA) or became unable to pay its debts as a consequence of the preference, at the time the preference was given. Here, the Company was already facing cash flow problems and the liquidator may be able to prove this requirement.

On the facts, while most requirements for purposes of section 239 IA may be met, it would be difficult for the liquidator to show there is a desire to prefer Beans & Leaves in making the payments. However, if the requirements are met, the court has the power to make a wide range of orders as it thinks fit for restoring the position to what it would have been if the company had not given that preference.

*** End of Assessment ***

¹ [1990] BCC 78.

Commented [JL13]: 0
Refer to p 64 in the Guidance Text.
This scenario deals with a disposition after the commencement of the company's insolvency proceeding.
Therefore, s 127 and not s 239 applies.