



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 3B
THE INSOLVENCY SYSTEM OF THE UNITED KINGDOM
(ENGLAND AND WALES)

This is the **summative (formal) assessment** for **Module 3B** of this course and is compulsory for all candidates who **selected this module as one of their compulsory modules from Module 3**. Please read instruction 6.1 on the next page very carefully.

If you selected this module as **one of your elective modules**, please read instruction 6.2 on the next page very carefully.

The mark awarded for this assessment will determine your final mark for Module 3B. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment3B]**. An example would be something along the following lines: 20222-514.assessment3B. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6.1 If you selected Module 3B as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2022**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2022. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
- 6.2 If you selected Module 3B as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2022** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. If you elect to submit by 1 March 2022, you **may not** submit the assessment again by 31 July 2022 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **7 pages**.

ANSWER ALL THE QUESTIONS

Commented [JL1]: 37 out of 50

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.

(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 [JL3]: c

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

Section 423 of the Insolvency Act 1986 provides an avenue for persons to challenge transactions entered into by the company which are designed to defraud creditors. The following persons may bring an action under section 423 in the following circumstances:

- a) Where the company is being wound up or in administration – the official receiver, the liquidator, the administrator and (with the permission of the court) any victim of the transaction such as a creditor;
- b) Where a victim is bound by a company voluntary agreement (CVA) – the supervisor of the SVA or any victim of the transaction; or
- c) In any other case – by a victim of the transaction.

To bring a successful action under section 423, the person bringing the claim must satisfy the court that the company entered into (i) a transaction with another person and received no consideration or significantly less consideration than it has provided and (ii) the transaction for the purpose either of putting assets beyond the reach of creditors, whether present or future, or of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.

(ii) Section 6 of the Company Directors Disqualification Act 1986

The Secretary of State may bring an action under section 6 of the Company Directors Disqualification Act 1986 to disqualify a person from being a director where he considers or has received a report from a liquidator or administrator that the director of an insolvent company was and/or is unfit. The court may make a disqualification order where it is satisfied that the person is or has been a director of an insolvent company and that the director's conduct makes him unfit to manage a company.

(iii) Section 246ZB of the Insolvency Act 1986

Under section 246ZB of the Insolvency Act 1986, a liquidator is able to bring a claim against a director of the company for wrongful trading which can, in certain circumstances, make the director liable for some of the debts and liabilities of the company. The policy behind the wrongful trading action is aimed at ensuring that, when directors become aware that there is a prospect of an insolvent liquidation (or administration), they do everything possible to minimise potential losses to the company's creditors.

Commented [JL5]: administrator

The liquidator may ask the court to declare that a director should make a contribution to the company's assets, however, in order to make such an order, the court must be satisfied that:

- a) The company has gone into insolvent liquidation;
- b) At some point before the commencement of the winding up of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation; and
- c) That at the time the person reached that conclusion or ought to have reached that conclusion that person was a director of the company.

A director may however absolve himself from all liability for wrongful trading if he took every step with a view to minimising the potential loss to the company's creditors as he ought to have taken once he knew or ought to have known that insolvency winding up was inevitable.

Commented [JL6]: 4

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 five qualifying decision procedures provided by rule 15.3 of the Insolvency Rules, 2016 by which a convener may seek a decision from the creditors of an insolvent company 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.

These procedures may be employed whether or not an actual creditor's meeting is held.

Commented [JL7]: 5

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

Commented [JL8]: 10 out of 15

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?

Ordinarily when a company is subject to an insolvency procedure, a creditor, including a supplier, will seek to rely on provisions in their contract of supply that allow for termination of the supply of goods or services to the company and to terminate the contract on the ground of insolvency. This will obviously create problems for an administrator who wishes to operate the business as a going concern.

Generally, an administrator can require suppliers of goods and services to continue to supply those goods and services during the administration subject to certain conditions which may include the provision of a personal guarantee by the administrator. This general rule is of course subject to restrictions on the types of services that an administrator can require to be continued during the administration. This is addressed in more detail below.

Section 233 of the Insolvency Act prohibits a supplier from terminating the supply of gas, electricity, water and communication services in order to ensure that there is a continued supply of essential services to the company in administration. The supplier may, however, stipulate that the administrator must personally guarantee payment of charges in respect of the continued supply. At the very least, by virtue of section 233, an administrator can require the suppliers of these essential services to continue their supply during administration subject to providing a personal guarantee in certain instances. Considering the importance of these essential services to the continued operation of the company's business it is likely that the administrator may be prepared to offer a personal guarantee.

Section 233A of the Act also expands on the protections afforded to an administrator, as a supplier of such services is generally unable to rely upon an “insolvency-related term” or “ipso facto clause” in a contract of supply which would otherwise entitle the supplier to terminate the supply, alter the terms of the supply or compel higher payments for continued supply. The supplier is therefore bound by the terms previously agreed with the company.

Generally, a provision of a contract for the supply of goods or services to the company is of no effect when the company enters an insolvency procedure, if, under that provision the contract would terminate or the supplier would be entitled to terminate the contract or to do any other thing upon the company entering an insolvency procedure. The Corporate Insolvency and Governance Act 2020 introduced section 233B to the Act which extends the prohibition on termination of contracts to all suppliers with a limited number of exceptions which include insurers, banks, electronic money institutions, recognised investment exchanges and clearing houses, securitisation companies; and overseas companies with corresponding functions. The introduction of section 233B now protects against the termination of supply during the administration. Therefore, an administrator can require suppliers to continue their supply during administration.

The protection afforded by section 233B is however subject to a supplier's right to terminate the contract if the administrator consents or, on an application to the court, where the court is satisfied that the continuation of the contract would cause the supplier hardship and grants permission for permission.

In sum, an administrator can require suppliers of goods and services to continue their supply during administration where the administrator wishes to continue to operate the business as a going concern. However, an administrator may not be able to require suppliers to continue the supply of all services and a supplier may require a personal guarantee to be provided by the administrator for the continued supply of goods or services or apply to the court to terminate the contract of supply where there is hardship.

Commented [JL9]: 5

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.

The order of priority of payments in a liquidation refers to the order in which the liquidator will distribute/apply the assets of the company which have been realised during the liquidation. The order of priority of payments in a liquidation is as follows:

- a) Expenses that are properly incurred by the liquidator in preserving, realising or getting in any of the assets of the company (including the conduct of any legal proceedings);
- b) The cost of any security provided by the liquidator;
- c) Any amount payable to a person to assist in the preparation of a statement of affairs or accounts;
- d) Any necessary disbursements by the liquidator in the course of the winding up (including, for example, any expenses incurred by members of the liquidation committee);
- e) The remuneration of any person who has been employed by the liquidator to perform any services for the company;
- f) The remuneration of the liquidator (which is subject to effectively the same rules as those which apply to administrators, specifically including the fees estimate regime where a time cost basis for the liquidator's fees is adopted);
- g) The amount of any corporation tax on chargeable gains accruing on the realisation of any asset of the company;

- h) Any other expenses properly chargeable by the liquidator in carrying out the liquidator's functions in the winding up;
- i) The company's preferential creditors;
- j) Holders of floating charges;
- k) The company's unsecured creditors; and
- l) Shareholders.

The order of priority ensures that the company's assets are distributed based on the established hierarchy with payments being first made from top to bottom. Generally, each class of expense and creditor must be paid in full before funds are allocated to the next.

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

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 consider bringing a claim under section 245 of the Insolvency Act 1986 for the avoidance of the floating charge.

Commented [JL10]: 5

This question required an explanation of the priorities. The answer here has done little more than list the order of priority. More detail on the rights and the nature of the claims were expected.

Commented [JL11]: 9 out of 15

(i) Section 245 claim for the avoidance of the floating charge

The liquidator could bring a claim under section 245 of the Act to challenge the floating charge granted by the Company to Stercus. If successful the floating charge will be invalidated.

Section 245 aims to prevent an existing creditor from obtaining a floating charge shortly before a company enters into insolvency, thereby, putting the creditor in a better position than he would have previously been in.

In order to bring a successful claim under section 245, the liquidator would need to satisfy the court that the floating charge was granted within 12 months prior to the Company entering into insolvent liquidation and that at the time of the grant of the floating charge, the Company was either unable to pay its debts or became unable to do so as a result of the floating charge. Considering that the floating charge was granted in February 2021 and in July 2021, the Company was still experiencing cash flow problems, it can be reasonably inferred that the Company may have become unable to pay its debts as a result of granting the floating charge. Additionally, there is no evidence that any consideration was given by Stercus for the floating charge and the grant of the charge may have simply been to deter Stercus from calling in the Company's existing loans.

A successful claim under section 245 would make the floating charge granted by the Company invalid. However, although invalidated, the underlying debt would remain valid and the liquidator would need to attend to this in his liquidation of the Company, notwithstanding that the priority afforded to Stercus by the floating charge would no longer be applicable.

As a second option, the liquidator could also consider a claim under section 239 for the avoidance of a preferential transaction. However, although the liquidator would be able to satisfy most of the prescribed requirements for a successful claim, the fact that the debenture was granted more than six months before the Company entered into liquidation would prevent the claim from being successful. In order for the claim to be successful, the Company would have needed to have granted the debenture to Stercus within six months prior to the Company going into liquidation with there being no evidence that Stercus was a connected person to the Company. The relevance of Stercus not being a connected person is that where a person is a connected person the relevant period for the preferential transaction is two years as opposed to six months.

In view of the of the Company entering into liquidation more than six months after the debenture was granted and Stercus not being a connected person, the claim under section 239 would be unsuccessful.

Question 4.2 [maximum 6 marks]

The sale of the coffee roasting machines; and

The liquidator may consider bringing a number of claims against the directors of the Company in respect of the sale of the coffee roasting machines including claims alleging:

- a) The transactions were at an undervalue;
- b) The transactions were intended to defraud creditors;
- c) Wrongful trading;
- d) Misfeasance;
- e) Director disqualification; and
- f) Breach of fiduciary duty.

Commented [JL12]: Connected party sale? How does this influence the inability to pay debts?

Commented [JL13]: Preference not possible due to time and desire.

Commented [JL14]: 3
Applies only to floating charges.

a) A claim for the avoidance of transactions at an undervalue

A claim may be brought by the liquidator under section 238 of the Insolvency Act 1986 for the avoidance of the sale of the machines to Ann. In order to bring a successful claim under section 238, the liquidator must satisfy the court that the Company entered into the sale with Ann (i) within two years prior to it going into insolvent liquidation, (ii) the consideration received by the Company for the sale of the machines was significantly less than the value of the machines and (iii) the Company was either unable to pay its debts because of the sale or became unable to pay its debts because of the sale.

The sale occurred a few months prior to the Company entering into liquidation and therefore it was within the requisite two year period.

Considering that the machines were sold to Ann, a director of the Company and therefore a connected person, for £10,000 less than a year from when they were bought for £25,000, it is highly likely that they were sold for significantly less than their market value. Even if one were to take depreciation into consideration, one could still conclude that the machines were sold for significantly less than they were worth.

Based on the facts at the time of the sale the Company was experiencing cash flow problems and therefore could have been unable to pay its debts. In any event, it is clear that the Company became unable to pay its debts shortly after the sale as it went into insolvent liquidation.

Ann may be able to save the sale and avoid any consequences if she is able to satisfy the court that the sale was entered into in good faith, for the purpose of carrying on the Company's business and that at the time the sale occurred, there were reasonable grounds for believing that the transaction would benefit the Company. However, on the facts of the case, it would be difficult to convince the court that the sale of equipment needed to generate revenue for the Company to a connected person at an undervalue within months prior to the Company being insolvent.

In all the circumstances it is likely that the court would invalidate the sale of the coffee machines to Ann.

Commented [JL15]: 6

b) A claim for the avoidance of the transactions which were intended to defraud creditors

A claim may be brought by the liquidator under section 423 of the Insolvency Act 1986 to attack the sale of the coffee machines to Ann Young. In order to bring a successful claim under this section, the liquidator would need to be able to satisfy the court that the Company sold the coffee machines to Ann at an undervalue for the purpose of putting assets beyond the reach of the Company's creditors or otherwise prejudicing the creditor's interest. Whereas the facts of the case do not disclose whether the sale was intended to defraud the Company's creditors it could be argued that the sale prejudiced the creditors as the machines were sold at an undervalue and therefore made the Company's pool of assets available to its creditors smaller. If the claim is successful, the sale of the machines to Ann would be invalidated.

c) Wrongful trading

A claim may be brought for wrongful trading under sections 214 and 246ZB of the Insolvency Act against the directors of the Company who approved the sale of the coffee machines (i) at an undervalue and (ii) to a fellow director (connected person).

The sale was approved in July 2021 at a time when the Company continued to suffer cash flow problems and as a result, the directors would have known or ought to have known that

the Company could be put into insolvent liquidation. The Company having gone into insolvent liquidation and the sale being approved by the directors, the liquidator would need to satisfy the Court that the directors knew or ought to have concluded that there was no reasonable prospect that the Company would avoid going into insolvent liquidation when they approved the sale. The burden of proof is on the liquidator who would need to provide the court with cogent evidence to satisfy it that the directors were guilty of wrongful trading.

On the assumption that the coffee machines were an integral part of the Company's operations and would be used to generate revenue, it would be difficult for the directors to justify the sale at an undervalue in circumstances where the Company was facing cash flow issues and the machines could have contributed to the Company's revenue. If the directors were to avoid liability they would need to satisfy the court that when they took every step with a view to minimising the potential loss to the Company's creditors as they ought to have taken.

If the court finds that the directors were liable for wrongful trading the court can make an order for the directors to compensate the Company in an amount in line with the increase in its liabilities following the sale of the coffee machines to when it ended up in insolvent liquidation.

d) Misfeasance

A claim may be brought by the liquidator against the directors of the Company for misfeasance under section 212 of the Insolvency Act. A claim for misfeasance may be brought by the liquidator where there is evidence or suspicion of a breach of duty or care and skill by the directors. The liquidator could argue that the directors of the Company failed to exercise the necessary care and skill that was to be expected of a director when approving the sale of the coffee machines to a fellow director at an undervalue particularly in circumstances where the Company was facing financial issues. The Court will consider all the circumstances surrounding the sale of the coffee machines to Ann Young in determining whether there was a breach of duty. If the court considers that there was a breach of duty or misfeasance on the part of the directors in approving the sale, the court may order the directors to repay or to contribute such sum to the Company by way of compensation. In light of the sale being made to a connected person at an undervalue and at a time when the Company was experiencing cash flow problems, it is likely that the Court will consider that this was a case of misfeasance.

e) Director disqualification

The liquidator may consider making a report to the Secretary of State under the Company Directors Disqualification Act 1986. If the Secretary of State considers that there is cause, the Secretary of State, may decide to take action against the directors by instituting court action to seek the disqualification of the directors for up to 15 years. This is somewhat a high threshold as the acts of the directors must amount to real moral blame. Whereas this could be a possible consideration for the liquidator, it may not be the best course of action as it would utilise the Company's assets and does not necessarily provide prospects of recovery of assets for the Company.

f) Breach of fiduciary duty

The liquidator may also consider instituting a common law claim against the directors for breach of fiduciary duty. The liquidator would argue that the directors failed to act in the best interest of the Company when they approved the sale of the coffee machines which were an integral part of the business to a connected person at an undervalue when the Company was experiencing cash flow machines.

Question 4.3 [maximum 4 marks]

The payments to Beans and Leaves Ltd.

Pursuant to section 129(2) of the Insolvency Act 1986, the winding up of the Company commenced on the date of presentation of the petition, that is, 14 October 2021. The payments to Beans and Leaves Ltd were therefore made subsequent to the commencement of winding up proceedings as they were made one month prior to the winding up order which was made on 23 December 2021.

Under section 233A of the Act Beans and Leaves Ltd could not alter the agreement and under section 233B of the Act and could not terminate the supply agreement with the Company by virtue of it having gone into insolvent liquidation unless it applied to, and satisfied, the court that to continue the contract on the same terms would cause hardship. As a result, there was no need for the directors to have given in to the demands of Beans and Leaves Ltd for payment of the Company's existing liabilities or to agree to payments on a cash on delivery basis.

The liquidator may therefore seek to revert to the original terms of the contract with Beans and Leaves Ltd.

The liquidator may also consider bringing a claim for the avoidance under section 239 of the Insolvency Act as a preferential transaction. The liquidator would need to satisfy the court that (i) Beans and Leaves Ltd was a creditor of the Company, (ii) the payment of existing liabilities was done to put Beans and Leaves Ltd in a better position than it previously had been in, (c) the Company was influenced by a desire to put Beans and Leaves Ltd in a better position than it would have been in in the event the Company went into liquidation and (d) the preference was within six months prior to the Company going into liquidation.

Having been owed by the Company, there is no doubt that Beans and Leaves Ltd was a creditor of the Company. The payment of the existing liabilities was also made shortly before the Company went into liquidation and therefore falls within the six month time period. It can also be argued that the payment had placed Beans and Leaves Ltd in a better position than it would have been in in the event the Company went into insolvent liquidation, which it did. The difficult question would be whether the Company was influenced by a desire to prefer Beans and Leaves Ltd. It is not disputed that the Company wanted to ensure that Beans and Leaves Ltd continued their supply of beans as this was seen as essential to the continuation of the Company's business. Notwithstanding that, the courts have stated that where a company was influenced solely by commercial considerations, specifically attempts to ensure that the company continued trading, there could be no desire to prefer.

In all the circumstances and based on the evidence available, it is unlikely that the court would find that the payment to Beans and Leaves Ltd was influenced by a desire to prefer. It is more likely that the court will find that the payments were made to ensure that the Company continued trading in order to generate revenue when it was experiencing cash flow **problems**.

Commented [JL16]: 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.

*** End of Assessment ***