



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.

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Well Done!

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(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?

It must be obtained by a connected person. This includes directors, or persons who control the company such as shareholders or even secured creditors holding sufficient shares.

(a) The administrator.

(b) Any secured creditor with the benefit of a qualifying floating charge.

(c) The purchaser.

(d) The company's auditor.

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Question 1.5

Which one of the following **is not** a debtor-in-possession procedure?

(a) Administration.

(b) Restructuring Plan.

(c) Scheme of Arrangement.

(d) Company Voluntary Arrangement.

Question 1.6

A liquidator may pay dividends to small value creditors based upon the information contained within the company's statement of affairs or accounting records. In such circumstances, a creditor is deemed to have proved for the purposes of determination and payment of a dividend where the debt is **no greater than how much**?

(a) £500

(b) £750

(c) £1,000

(d) £2,000

Question 1.7

Which one of the following **is not**, in itself, a separate ground for disqualification of a director under the Company Directors Disqualification Act 1986?

(a) Wrongful trading.

(b) Breach of fiduciary duty.

(c) Being found guilty of an indictable offence in Great Britain.

(d) Being found guilty of an indictable offence overseas.

Question 1.8

The administrator is under a general duty to provide a statement for creditors' consideration setting out proposals for achieving the purpose of administration. He or she must obtain a creditors' decision on whether or not to approve the proposals within how many weeks of the date the company entered administration?

(a) 6

(b) 8

(c) 10

(d) 12

Question 1.9

Which of the following statements is incorrect?

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

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

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

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

Question 1.10

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

(a) 6 months.

(b) 12 months.

(c) 2 years.

(d) 5 years.

QUESTION 2 (direct questions) [10 marks]

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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) Any victim of a transaction which defrauds creditors under section 423 of the Insolvency Act 1986 (**IA**) is eligible to bring an action under the IA. Section 424 of the IA provides an application for an order under section 423 can be made by:
 - (a) official receiver, trustee of the bankrupt's estate or the liquidator or administrator of the company or by a victim of the transaction (with the leave of the court) in relation to the debtor's bankruptcy/ winding-up of the debtor company as the case may be;
 - (b) by the supervisor of the voluntary arrangement where such victim is bound by a voluntary arrangement (approved under Part I or Part VIII of the IA) or by any person who is such a victim; oras mentioned above, in any other case, by a victim of the transaction.
- (ii) Usually, the action for disqualification of directors under section 6 of the Company Directors Disqualification Act 1986 (**CDDA**) are brought by the Insolvency Service acting on behalf of the Secretary of State for Business.

The Secretary of State is the applicant in such cases and can apply for the disqualification of directors based on the evidence showing that directors, among other things, permitted a company to continue trading while insolvent, allegations of fraud or engaging in preferential treatment of creditors etc. Whilst the courts also have a discretionary power to disqualify directors, applications under section 6 are not covered under the circumstances where courts can exercise such power.

- (iii) Section 246ZB of the IA provides for making directors of an insolvent company liable for wrongful trading. This action can be brought only by the administrator (and not a creditor or contributory). This provision is similar to Section 214 of the IA where actions of this nature are brought about by the liquidator.

This section will apply only if the company has entered insolvent administration, or the person against whom these proceedings were initiated would have reasonably known that the company was on the verge of entering insolvent administration or going into insolvent liquidation, and the person was a director of the company at that time of this event.

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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.

All decisions made by creditors in relation to an insolvent company come from a qualifying decision procedure (**QDP**) which are provided in Part 15 of the Insolvency (England and Wales) Rules 2016 (**IR**). IR 15.3 lists the following 5 QDPs are as follows:

a) Correspondence: this usually is the case where a written decision of relevant creditors is circulated and the procedure does not involve any physical meetings or contact as such with each other. It is efficient form of QDP where the creditors need not hold a physical meeting.

b) Electronic voting: this means any electronic system which enables a person to vote without the need to attend at a particular location. It must be noted that the notice delivered to creditors should provide necessary information on accessing the voting system (IR15.4(a)). Unless electronic voting is being used at a meeting, the voting system allow a creditor to vote at any time between the notice being delivered and the decision date (IR15.4(b)) and until the decision date has passed, the voting system should not provide any creditor with information concerning the vote cast by any other creditor IR15.4(c).

c) Virtual meeting: this means a meeting where relevant persons are not physically present at the same location but communicate with each other directly in the meeting, for example, a telephone conference or a video conference through Zoom etc. Just like in case of e-voting, the relevant details in relation to accessing the virtual meeting, portal details, password etc. must be provided to the creditors (IR15.5(a)). Also, a statement is made by the chair of the meeting that it may be suspended or adjourned (IR15.5(b)).

d) Physical meeting: This involves all creditors voting to meet each other in person and physically cast their votes. IR 15.6 provides useful guidance on the conduct of such QDP. A request for a physical meeting must not be made any later than 5 business days after the date on which the convener delivered the notice such QDP or deemed consent procedure (IR15.6(1)). The convener must keep the creditors informed and updated with the relevant information and decisions in relation to the physical meeting. The convener may permit a creditor to attend a physical meeting remotely upon a request received in advance of the meeting and the notice of the meeting should include a statement explaining the convener's discretion to permit remote attendance (IR15.6(6)).

e) Any other decision making procedure which enables all creditors (who are entitled to participate), to participate equally in making the decision.

As a notice is provided to creditors under all such QDPs, it is helpful to note that r.15.2(2) the decision date is at the discretion of the convener but must be no less than 14 days from the date of delivery of the notice of the decision making / deemed consent procedure.

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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?

Section 233 of the IA provides that among others, an administrator can require the suppliers of goods and services to continue their supply to the company.

Supplies contemplated under this part include supply of gas, electricity, water and communications and several other good and services (Section 233(3) of IA) (**Supplies/ essential goods and services**).

The goods and services referred to in Section 233(3)(f) are:

(a) *point of sale terminals;*

(b) *computer hardware and software;*

(c) information, advice and technical assistance in connection with the use of information technology;
(d) data storage and processing;
(e) website hosting.

As per Section 233(2), if among others, an administrator makes a request (after the effective date i.e. after the company is in administration¹), of any of the supplies, the supplier may require the administrator to provide personal guarantees for the payment of any charges in respect of the supply as a condition to making such supply. However, the supplier may not seek payment towards any outstanding charges due before the date of company entering into administration, as a condition to providing further supplies to the administrator.

It must be noted that in relation to essential goods and services, and pursuant to Section 233A(1), an insolvency-related contract term ceases to have effect once a company is, among others, a company enters administration. There are certain conditions and exceptions to this statement i.e. unless it falls within one of the subsections of Section 233A.

Section 233A(8) defines an insolvency-related term of a contract for the supply of essential goods or services to a company to mean-

(a) the contract or the supply would terminate, or any other thing would take place, because the company enters administration or the voluntary arrangement takes effect,
(b) the supplier would be entitled to terminate the contract or the supply, or to do any other thing, because the company enters administration or the voluntary arrangement takes effect,
or
(c) the supplier would be entitled to terminate the contract or the supply because of an event that occurred before the company enters administration or the voluntary arrangement takes effect.

Specifically in relation to administration, Section 233A(2)(a)(c) provides an exception to the rule under 233A(1) in that a supplier is entitled to terminate the contract/supply because of an event that occurs, or may occur, after the company enters administration. However, pursuant to Section 233A(5), the supplier must give a written notice to the administrator that the supply will be terminated unless he/she personally guarantees the payment of any charges in respect of the continuation of the supply after the company entered administration, and termination should only be effective if the administrator does not give that guarantee within the period of 14 days beginning with the day the notice is received.

Commented [DJ9]: Section 233B?

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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.

One of the primary purposes of a liquidation of a company is to distribute the assets of the company (including any funds recovered as a consequence of voidable transactions including but not limited to preferences and fraudulent trading), amongst all creditors and other stakeholders of the company.

The order of distribution of assets of a company is not as straightforward as the *pari passu* principle where all creditors are treated equally. The relevant priorities are provided in the IA (as described further below):

¹ Section 233(4) of IA

- Secured Creditors:

Whilst this is not categorically provided as a priority payment under the IA, a holder of a qualified floating charge may enforce its rights under the same, usually by appointing an out of court administrator to realise the secured assets under the charge. Accordingly, a liquidation cannot proceed until the administration is complete. However, a secured creditor can reach agreement with the liquidator to commence and continue with the liquidation provided that the liquidator realise the assets of the floating charge holder and satisfy the debt prior to the other realisations and payments.

- Liquidation costs and expenses:

Section 115 provides that all expenses in relation to winding up including the liquidators' fees are payable in priority to all other claims. IR7.108(1) (for winding-up by court) and IR6.42(1) (for creditors' voluntary winding-up) provides that all '*fees, costs, charges and other expenses incurred in the course of winding up*' are to be regarded as expenses of the winding up. IR6.42 and IR7.108 further provide details (and an order of priority under sub-section 4) in relation to the expenses of liquidation treating the expenses incurred by the liquidator as first in line of priority. The reason a liquidator is provided this priority over all other claims is that he/she is providing services to ensure the best possible returns for the creditor and key stakeholders and the creditors therefore have a common interest in the liquidator's functions and duties. Some of the costs/ expenses contemplated in sub section 4 of either of the rule 7.108 or 6.42 are as follows:

- expenses incurred by the liquidator in preserving, realising or getting the assets of the company or otherwise in the preparation or conduct of any legal proceedings (including arbitration or related proceedings)
- expenses incurred by the official receiver
- security of costs provided by the liquidator pursuant to the IA/IR
- fees payable to a person employed or authorised to assist in the preparation of a statement of affairs or of accounts
- fees payable to an official receiver for performing its duties
- any necessary disbursements by the liquidator in the course of the administration of the winding up
- remuneration of a provisional liquidator (if any)
- remuneration due to the liquidator; and
- any other expenses/ disbursement properly chargeable by the liquidator in carrying out the liquidator's functions in the winding up.

- Preferred creditors:

Once the costs and expenses of liquidation (as above) are paid in full, then the payment to preferential creditors will be made from the remaining assets of the company. Generally, preferred creditors comprise (salaries and outstanding payments to) employees, wage earners and (taxes owed to) the government/ the Crown.

Section 386 of IA provides for categories of preferential debts i.e. Ordinary preferential debts and Secondary preferential debts. It must be noted that ordinary preferential debts are paid before secondary preferential debts. However, the respective classes rank *pari passu* and are paid in equal proportion amongst themselves. A brief summary of the categories of debts (as contemplated under Section 386 and Schedule 6) are as follows:

- Debts due to the Inland Revenue Department which include deductions from income tax in relation to taxable earnings paid during the relevant period

- Debts due to Customs and Excise which includes value added tax (**VAT**) for the relevant period, insurance premium tax, landfill tax, and climate change levy etc.

Ordinary preferential debt (i.e. these debts are paid out of the assets of a debtor prior to secondary preferential debts)

- Social security contributions and contributions to occupational pension schemes, etc.
- Remuneration of employees, wages or salary etc. which is owed by the debtor to such present or former employee of the debtor for a period of 4 months prior to commencement of winding-up and does not exceed such amount as may be prescribed by order made by the Secretary of State. (*Category 5 under Schedule 6*) It is one of the most important preferential payments. However, it must be noted that while the employees are provided protections under the Employment Rights Act 1996, the payments of their remuneration as a preferential debt under the IA also stay in place.
- Levies on coal and steel production
- Debts owed in respect of an eligible deposit under the Financial Services Compensation Scheme (FSCS).

Secondary preferential debts (*Categories 8 and 9 – Paragraph 15BA, 15BB and 15D*):

- Debt owed to eligible persons relating to eligible deposits exceeding any compensation payable under the FSCS.
- Debt owed to eligible persons relating to eligible deposits made through a credit institution (in UK or authorised credit institution outside UK)
- Certain debts relating to VAT or a relevant deduction owed to Her Majesty's Revenue and Customs (HMRC) Commissioners.

- Floating charge holders

Once the assets of the company are used to satisfy preferential debtors, payments can be made to floating charge holders as per Section 176A of the IA. If there are more than 2 floating charges, priority would generally be given to the floating charge that was created first.

Prescribed part

It must be noted that under Section 176A, all the remaining assets (after the payments made as above in relation to liquidation costs and preferential debts) are not necessarily available to the floating charge holders. Section 176A(2) requires the liquidator to set aside the prescribed part (i.e. 50% of the property if the net properties of the company do not exceed £10,000 and 20% of the excess in value exceeding £10,000), for the satisfaction of unsecured debts. There are certain exceptions i.e. if the company's property is less than £10,000, or if the liquidators think that the costs of making distribution to unsecured creditors would be disproportionate to their benefits, then sub-section 2 would not apply.

- Unsecured creditors.

As mentioned above, if a prescribed part is set aside, or if any part of the properties remain for realisation after the payment towards the costs of liquidation, preferential debts and floating charges has been made, then the unsecured creditors are paid. Unsecured creditors are essentially trade creditors and involved in carrying on business with the debtor. They are last in the statutory order for creditors. Usually, there isn't a lot left in the estate after the payment of other debts ahead in priority and it is often the case that unsecured creditors either receive nothing or unable to realise their entire debt.

- Interest incurred on all unsecured debts post-liquidation
- Shareholders

The shareholders are last in priority of payment out of the estate and usually the funds aren't sufficient to pay off the shareholders in respect of their shares. Once all creditors are paid and funds are in fact available in the estate of the debtor, the shareholders are paid in accordance with the company documents/ constitutional documents and shareholders agreements. This is usually distributed on a pro rata basis as per the shareholding of the respective shareholders of the company.

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

Commented [DJ11]: 14 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:

Common introduction for all 3 analysis below:

Section 127 of the IA provides that any disposition of a company's property made after the commencement of the winding up of such company, is void (unless otherwise ordered by the court). The winding up of a company by the court is deemed to commence at the time of the presentation of the petition for winding up (Section 129(2)) i.e. on the 14 October 2021 in relation to Corfee Zero Limited (**Company**). The term 'disposition of property' has a fairly wide

scope to include any transaction where property of a company ceases to be vested in it (such as by way of charge, mortgage, gift etc.), and payments of money or assets of the company being sold to transferred.

Section 123 of the IA provides for a definition of a company's inability to pay debts i.e. insolvency and includes circumstances where a company is cash-flow insolvent (i.e. unable to pay its debts as they fall due) or balance sheet insolvent (i.e. company's assets are lesser than its liabilities (including contingent liabilities) or if the company fails to satisfy a valid written demand of the debtor under the IA.

Question 4.1 [maximum 5 marks]

The floating charge in favour of Stercus Bank plc;

Specifically, in relation to floating charges, Section 245(2) of the IA makes a floating charge on the company's undertaking or property created at a relevant time (i.e. within a period of 12 months from the onset of insolvency of the company) invalid unless, among other things, it related to new money coming in from the creditor into the company. The primary purpose for such a provision is to avoid the pre-existing unsecured creditors to secure their debt by way of a floating charge shortly prior to the company entering into a formal insolvency procedure.

It must be noted that under Section 245(4), while the floating charge was being created, it must be shown that the company was unable to pay its debts (under Section 123 of the IA or as a consequence of the floating charge). A floating charge will be considered to be invalid only when the company is in liquidation.

Stercus Bank plc (**Bank**) was granted a debenture containing a floating charge in February 2021 i.e. within the 12 months from the onset of insolvency i.e. within 12 months from presentation of the winding-up petition on 14 October 2021). It is arguable that the floating charge was created when the Company was unable to pay its debts as they fell due as it did not repay the loans to the Bank and granted this floating charge in favour of the Bank instead.

Thus the floating charge will most likely be invalid as it falls within the ambit of Section 245 of the IA. However, it must be noted that the underlying debt is not invalid.

In any event, Section 239 of the IA deals with transactions that can be avoided by the court upon the application of a liquidator (or administrator) if a creditor have been preferred over the other creditors through such transaction within the relevant time. The underlying purpose of this provision is to prevent a company shortly before entering formal insolvency procedure to favour and place one creditor in a better position than others. An application under this provision can only be made if the company is in liquidation.

In order to successfully make an application for a transaction to be void under this provision, the liquidator has to prove certain aspects of a transaction and the burden of proof lies on the liquidator:

- (a) that person is one of the company's creditors (or a surety or guarantor for any of the company's debts or other liabilities);²
- (b) the company does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the company going into

² Section 239(4)(a), IA

insolvent liquidation, will be better than the position he would have been in if that thing had not been done³;

(c) the company was influenced by a desire to prefer such creditor over the others⁴;

(d) the preference was given as the 'relevant time'

Thus, the Company did grant a debenture in favour of the Bank and such debenture may fall within the ambit of a voidable preference under the IA. However, case law⁵ on this subject specifically in relation to proving 'a desire to prefer' indicates that if a company is dependent on the bank for financial support and the bank would have otherwise withdrawn such support leading the company to further problems such as overdraft, then granting a debenture in favour of the bank may not be considered a 'desire to prefer'. In this case the fact that the Bank was putting pressure and it could be argued that the Bank's support was important for the continuation of trading and business of the Company, then the Court may exercise its discretion and not make such transaction void under Section 239.

Commented [DJ12]: 5

Question 4.2 [maximum 6 marks]

The sale of the coffee roasting machines; and

Section 238 of the IA deals with transactions made at an undervalue that can be avoided by the court upon the application of a liquidator (or administrator) if such transaction within the relevant time. As above, an application under this provision can only be made if the company is in liquidation (or administration)⁶.

In order to successfully make an application for a transaction at undervalue, the liquidator need to prove either of the below⁷:

- (a) the company makes a gift to that person; or
- (b) the company enters into a transaction with such person without any consideration; or
- (c) *the company enters into a transaction with such person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company.* (Section 238(4)(b), IA)

And the transaction should have occurred at the relevant time.

The relevant time in relation to a preference granted to a connected person (i.e. director or an associate of such director), is 2 years prior to the onset of insolvency⁸. As the sale was approved in July 2021 and it was to be made to Ann Young (a director), this condition is satisfied. Moreover, the director only paid £10,000 (in cash) for machines that had been bought for £25,000 just a year before. While ideally, an analysis of depreciation of machinery may be helpful to confirm the position, but it appears that the company probably has received significantly lesser money than the actual worth of the machinery.

Further, as mentioned earlier, the company must at the time of making the transaction should be insolvent, however, when a transaction at undervalue in issue is with a connected person, insolvency is presumed.

³ Section 239(4)(b), IA

⁴ Section 239(5), IA

⁵ See *Re MC Bacon Ltd.* [1990] BCC 78

⁶ Section 238(1), IA

⁷ Section 238(4), IA

⁸ Section 240(1)(a), IA

In view above, it appears that the court may order the restoration of the position of the Company to what it was prior to sale to Ann Young.

Having said that, under Section 238(5) of the IA, if the the court is satisfied that:

(a) the company entered into the transaction in good faith and for the purpose of carrying on its business, and

(b) at the time of the transaction, there were reasonable grounds to believe that the transaction would benefit the company.

Then, it will not order that such transaction was made at an undervalue.

Considering, that the Company was going through cash flow problems, the respondent i.e. the director in this case may make a case that the sale was made in good faith in order to infuse cash into the Company, however, it is on the discretion of the court whether it is satisfied with such submissions of the [director](#).

Commented [DJ13]: Remedies?

5

Question 4.3 [maximum 4 marks]

The payments to Beans and Leaves Ltd.

Pursuant to Section 127 (as described in the introduction above), any transaction or disposition of property of a company made after the commencement of winding-up of a company, is void unless validated by the court. The relevant time for such transactions to be declared void is from the presentation of the winding-up petition. As the payments to Beans and Leaves Ltd. (**BLL**) were made (and continuing) a month before the winding-up order of the Company was made, being a month before 23 December 2021 i.e. November 2021, such payments may be considered void as they were made within the relevant time i.e. after 14 October 2021 when the winding-up petition was presented.

However, it must be noted that the discretion of validating a transaction or disposition of property of a company lies with the court. This application may be made by the company and will only be considered if circumstances of the case indicate that the dispositions were made for the benefit of the general body of the unsecured creditors.

Payments are likely to be considered in the interests of the creditors if, among other things, they were necessary to enable the company to continue trading such as continued supplies, or where goods have been paid for on terms of cash on delivery which will enable the business to continue.

As the payments to BLL were made to ensure continued supply which was essential for the company to operate, the court may validate such payments as it appears to be made in good faith and would benefit all creditors and the Company's [business](#).

Commented [DJ14]: 4

*** End of Assessment ***