



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: 202223-336.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.**
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- 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 2023. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2023. 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 2023 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2023. If you elect to submit by 1 March 2023, you may not**

submit the assessment again by 31 July 2023 (for example, in order to achieve a higher mark).

7. Prior to being populated with your answers, this assessment consists of 8 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.**

Commented [WPA1]: 43/50 = 86% a generally very good performance indeed.

Commented [WPA2]: 10/10

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) GBP 500
- (b) GBP 750
- (c) GBP 1,000**
- (d) GBP 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]

Commented [WPA3]: 9/10

Question 2.1 [maximum 5 marks]

Commented [WPA4]: 4/5 only an administrator has standing to bring an action under s 246ZB - a liquidator may bring a wrongful trading action under s 214.

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?

Section 423 Insolvency Act 1986 provides for the avoidance of transactions that were designed to frustrate and/or defraud creditors.

The following parties may bring an action under section 423 of the Insolvency Act 1986:-

a. *Where the company is in administration or is being wound up:*

1. *The official receiver*
2. *The administrator (with leave of the court)*
3. *The liquidator*
4. *Any victim of the defrauding transaction*

b. *Where there is a CVA in place:-*

1. *The supervisor of the CVA*
2. *Any victim of the defrauding transaction (whether or not bound by the CVA)*

c. *In any other case:-*

1. *Any victim of the defrauding transaction.*

It must be noted that in order to engage section 423 of the Insolvency Act 1986 it must be shown that 1) the company entered into a transaction at an undervalue and 2) that the company entered the transaction for the purpose of either putting assets beyond the reach of persons who are making or may make claims against the company or for the purpose of prejudicing the interests of such persons making claims or who may make claims against the company.

The following may bring an action under section 6 of the Company Directors Disqualification Act 1986 ("CDDA"):-

- a. *The Official Receiver, under a delegated authority, can make an application under the CDDA if he finds evidence of unfit behavior by the director of the company.*
- b. *The Secretary of State will, in most cases, brings claims under the CDDA.*

A disqualification application usually follows a review of the circumstances which lead to the insolvency by the liquidator or the official receiver. The liquidator or official receiver will submit the report to the Secretary of State who may decide to further investigate or seek a disqualification order against the director.

246ZB of the Insolvency Act 1986 deals with the civil offence of what is referred to as "wrongful trading" when a company has gone into insolvent administration. The provision will only apply after formal insolvency proceedings.

The following may bring an action under the section:

- a. *The administrator*
- b. *Liquidator*

Question 2.2 [maximum 5 marks]

Commented [WPA5]: 5/5

List any five (5) of the debts which do not form part of the payment holiday under Part A1 of the Insolvency Act 1986 when a company is subject to a Moratorium.

1. *The monitor's remuneration*
2. *Rental expenses incurred during the moratorium*
3. *Goods and services during the moratorium*
4. *Wages and salaries arising under employment contract*
5. *Redundancy payments*

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

Commented [WPA6]: 13/15

Question 3.1 [maximum 6 marks]

Commented [WPA7]: 6/6 vg

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?

Yes an administrator can require suppliers of goods and services to continue to supply those goods and services during the administration.

An administrator having taken over the operation of a business will need to retain or obtain certain essential supplies and services to continue to run the business. Such supplies and services include water, electricity communications and gas and is covered under Section 233 Insolvency Act 1986 wherein a supplier is prohibited from requiring payment of outstanding debts in order to continue or secure the supply of services to a company in administration. The suppliers however, can require the administrator to stand as personal guarantee for payment of charges relating to the supply of these services.

Section 233A also prohibits a supplier from relying on 'insolvency-related-terms' of a contract and prohibits them from altering the terms of the contract, requiring higher payment for the continuation of the supply of the services.

These protections are expended in the Corporate Insolvency and Governance Act 2020 Act by 233B which prohibits service providers from terminating or doing any other thing in relation to a service contract if the company enters into an insolvency procedure. Additionally, service providers are prohibited from imposing condition such as requiring that the pre-insolvency debts be paid. Furthermore, service providers are prohibited from making any other changes to the service contract such as increasing prices. A notable difference in the protection between 233 and 233B is that suppliers are prohibited from insisting that the administrator provide a personal guarantee for payment of services.

Question 3.2 [maximum 9 marks]

Commented [WPA8]: 7/9 generally very sound. Perhaps a little more clarity around fixed charge priority and more detail on the prescribed part might have been helpful.

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. How would this priority change if the company had been subject to a Moratorium under Part A1 of the Insolvency Act 1986 during the 12-week period prior to the commencement of the liquidation?

In an insolvency liquidation the company's assets are realized and creditors are paid of in order of statutory priority as much s possible. Part A1 Insolvency Act 1986 establishes a hierarchy of payment whereby certain creditors are given preferential status by way of a right to receive first payment.

The following is the hierarchy payment system stipulated by the Act which determines the order in which creditor groups are paid. Each creditor group must be paid in full before paying the next creditor group.

- Expenses in respect of the liquidation/administration
Section 115 of the Act, Rules 6.42 and 7.108 of the Rules - expenses in relation to the liquidation are given priority over preferential creditors, floating charge holders and unsecured creditors. Expenses include all those properly incurred by the liquidator to perform the liquidation.
- Liquidator's fees/expenses
These expenses include advising company, settling disputes, valuing and realizing assets and processing creditor claims.
- Secured creditors with fixed charges (banks or lenders who has been granted title over business assets in exchange for mortgage or loan)
These creditors hold the title over the particular business' asset thus the company lost its right to sell or trade the asset. These assets are fundamental to the business and usually include property, machinery and vehicles. During a liquidation, the liquidator or the charge-holder of these assets can sell and realize the funds to settle to debt.
- Preferential creditors such as employees
Preferential creditors are paid after the liquidation expenses and liquidators' remuneration. However, they enjoy priority payment before floating charge holders or unsecured creditors. Preferential creditors include employe remuneration including outstanding wages and holiday pay and some taxation liabilities. There are two classes of preferential creditors namely ordinary and secondary. Each class of preferential creditors rank equally amongst themselves and are thus abated in equal proportion should the company's assets be insufficient to pay all of them. Ordinary preferential creditors are paid before secondary. Secondary preferential creditors are defined in section 386 and include PAYE income tax, certain HMRC taxes or VAT payments.

- Secured creditors with floating charge
Secured creditors with floating charges will receive distribution from the net asset of the company, subject to the 'prescribed part' dilution. The 'prescribed part' is an amount set aside from the sale of the asset (net of cost of liquidation costs) and applies to charges taken out after September 15, 2003. Floating charge assets include raw materials, stock, fixtures and fittings.
- Unsecured creditors (includes HMRC debts, customers, suppliers and contractors)
At this stage there is very little money from the sale of the assets to pay these unsecured creditors.
- Unsecured creditors connected to the company
This creditor group of unsecured creditors include directors or employees who are owed expenses or repayment of loans. Family of such directors or employee could fall into this creditor group.
- Shareholders
Shareholders have taken the biggest business risk in providing company capital, as such they are entitled to repayment only when all other creditor groups have been repaid. That means, in all likelihood, they will not receive repayment of their original investment unless there was some form of security.

The Corporate Insolvency and Governance Act 2020 introduced a short term (initial 20 day) moratorium on creditor action. The 2020 Act divides debts into the following three categories:

- **Pre-moratorium debt with a payment holiday - wherein (with important exemptions) the company in moratorium would not have to pay debts that existed before the moratorium, or if the debt did not yet exist, where the obligation becomes liable for payment before the moratorium.**
- **Pre-moratorium debt without a payment holiday - where company is obliged to pay and/continue to pay certain debts because they fall due before the moratorium or during the moratorium. These include monitor's remuneration or expenses, goods and services supplied during moratorium, wages arising under contract, rent during the moratorium.**
- **Moratorium debts - new debts arising during the moratorium**

Under section 174A the priority of the payment described in the liquidation scenario above would change if the company had previously been subjected to a Moratorium under Part A1 of the Act and then subsequently entered into the

liquidation within the 12 week period prior to the commencement of the liquidation. In such scenario the following would be payable out of the assets of the company in priority to all other claims:

- *Pre-moratorium and moratorium debts for which the company did not have a payment holiday during the moratorium.*
- *The official receiver's prescribed fees and/or expenses who acted in any capacity in relation to the company;*

The pre-moratorium and moratorium debt would be payable in the following order of priority:

- *Fees/expenses payable in respect of goods and/or services provided during the moratorium under a contract*
- *Wages and salaries arising under employment contract*
- *Any liabilities or debts (separate from monitor's remuneration and expenses)*
- *Monitor's remuneration and expenses*

The above debts receive super priority. However, financial debts which fell during the moratorium do not enjoy this super priority status because it was accelerated or financing arrangement which terminated early. Fixed-charge creditors however retain their absolute priority status.

The significance of the change in the priority of payments is that moratorium debts and pre-moratorium debt (for which there was no payment holiday) are paid in priority to the subsequent liquidator's fees and expenses, the preferential creditors, the ring-fenced prescribed part for unsecured creditors and floating-charge holders in a subsequent liquidation proceeding.

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

Commented [WPA9]: 11/15

Prior to going into compulsory liquidation on 23rd December 2022, under pressure from its bank, Fretus Bank plc, and in order to prevent it from demanding repayment of the company's loans, Marbley Q Limited ("the Company"), granted a debenture in favour of Fretus Bank plc in February 2022. 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 2022.

In July 2022, as the Company continued to suffer cash flow problems, the directors approved the sale of two (2) marble cutting machines to Rita Perkins (a director) for GBP 10,000 in cash. The machines had been bought for GBP 25,000 a year before.

A month before the winding up order was made, Rita Perkins received an email from Hard and Fast 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 marble was seen as essential by the Company, the board authorised a payment of GBP 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 GBP 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 Fretus Bank plc and the two subsequent transactions. Using the facts above, answer the questions that follow.

Identify the relevant issues and statutory provisions and consider whether the liquidator may take any action in relation to:

Question 4.1 [maximum 5 marks]

Commented [WPA10]: 5/5

The floating charge in favour of Fretus Bank plc;

Following the wind-up order, the liquidator would have complete control of the company and its assets. The liquidator's duty under section 143 Insolvency Act 1986 is to ensure that the assets are got in, realized and distributed to the company's creditors and, if there is a surplus, distributed to the persons entitled to it. The liquidator also has a duty to investigate the circumstances leading up to the insolvency and to take the necessary actions prescribed under the Act.

Ordinarily a floating charge holder would have a right to receive payment out of the company's assets, albeit after the secured creditors, the liquidator's expenses and the preferential creditors. However, pursuant to section 245, the liquidator will examine the validity of any charges on the company's property and may agree or deny any creditor claims. Section 245 aims to ensure that creditors who obtain floating charges during the time when the company is insolvent or during the period leading up to formal insolvency do something to deserve the charge. The section seeks to prevent creditors converting unsecured debts into secured ones, thereby putting themselves in a better position in the event of the company's formal insolvency.

Section 245, which applies only to floating charges when a company is in administration or liquidation, will allow the liquidator to attack the floating charge and seek the available remedies. In order to succeed the liquidator will need to show that the transaction was a) entered into when the company was insolvent (as defined by section 123), b) during a relevant time and that c) no new consideration was provided to the company for the charge at the time of the charge.

The 'relevant time', where the charge is in favour of a connected person, is within 2 years prior to the onset of the insolvency. Where the charge is in favour of a non-connected person, the relevant time is within 12 months prior to the onset of the insolvency but only if the company was insolvent at the time the charge was created.

The debenture and resulting floating charge was granted in favour of Fretus, a non-connected person, and entered into 11 months prior to the Company going into formal insolvency. The Company was insolvent at the time as it was having cash flow problems. At the time of the charge Fretus did not provide any new consideration for the charge;- only a promise not to demand repayment of existing loans.

One question is whether the promise not to demand repayment of existing loans falls within any of the section 245 categories of 'new consideration'.

In essence, the two main categories of 'new consideration' set out in section 245 are:

- 1. Money paid, or goods or services supplied; and*
- 2. The discharge or reduction of company debt.*

It is to be noted that each of the above categories of is capable of being valued for money or money's worth.

Accordingly, the promise not to demand repayment of existing loans does not fall within the section 245 'new consideration' categories. It does not have any monetary value;- it is only a matter of convenience which is incapable of being measured in money or for money's worth. The floating charge was therefore granted with no corresponding monetary benefit to the Company.

A further point to note is that the floating charge is granted over the whole of the Company's undertaking. Without more, it is submitted that the consideration provided by the Company is itself incapable of monetary valuation.

The floating charge is invalid.

Question 4.2 [maximum 6 marks]

The sale of the marble cutting machines; and

Transaction at an undervalue

Without the benefit of a valuation, the sale of the marble cutting machines is a transaction at an undervalue because it sold for \$15,000 less a year after it was bought. This raises the issue of entering transactions at an undervalue when a

Commented [WPA11]: 6/6 more detail on s 238 would have been helpful as it is the most likely cause of action on the facts. Some of the discussion of WT appears to conflate WT with breach of duty which is a separate cause of action.

company is insolvent, an offence which is addressed by section 238 Insolvency Act 1986.

The liquidator has a duty and power to investigate activities leading up to the insolvency and therefore section 238 will permit him to attack the transaction. A prerequisite for liability under section 238 is that the company is insolvent at the time of the transaction and, in a case where the transaction involves a connected person, the company is presumed to be insolvent. These prerequisites are met because the Company was insolvent, as defined in section 123, because it was suffering cash flow problems and Rita is a connected person.

The liquidator will need to show that the transaction was for consideration which, in money or money's worth, was, at the date of the transaction, significantly less than the value, in money or money's worth of the consideration provided by the Company. This part of the test seems to be satisfied. Additionally, the liquidator must show that the transaction was entered into during a 'relevant time', namely 2 years prior to the company going into liquidation. It is noted that the transaction took place 3 months prior to the liquidation and accordingly, this part of the test is also satisfied.

Wrongful Trading

As a director of the Company Rita knew or ought to have concluded that the company was insolvent or approaching insolvency, i.e. the Company was unable to pay its debts as they fall due as defined in section 123. Rita however continued to trade and therefore breached her duty, failing to take into account what would be in the best interest of the Company's creditors. It is not necessary to prove 'trade' and some transactions such as selling company assets may be open to a wrongful trading action. Therefore, the sale of the marble machine will be caught by the section 214.

Under sections 214 and 246ZB wrongful trading, in essence, is when the company has entered insolvency and at some point before the liquidation or administration the directors knew or ought to have concluded that there was no reasonable prospect of the company avoiding insolvent liquidation or administration and from that point the director failed to take steps to minimizing the potential loss to the company's creditors

The liquidator must bring an action on behalf of the Company to sue Rita for wrongful trading and breach of duty. He will need to obtain evidence of misfeasance (section 212), malpractice, breach of fiduciary duty (section 238). The liquidator will seek all the available remedies under the Insolvency Act and must also report Rita as 'unfit' to the Secretary of State. The Secretary of State may take action to disqualify Rita for up to 15 years under section 4 Company Directors Disqualification Act 1986. Rita may be ordered to account for profit, restore the marble cutting machines, contribute to company's assets, be made

personally liable for the company debts, as well as compensate any creditors who may have suffered loss because of her actions.

Under section 214(4) Rita may be able to exonerate herself if she can satisfy the court that the transaction was entered into in good faith and for the purpose of carrying on Company business, and that at the time, there were reasonable grounds to believe that the transaction would benefit the company. If Rita is relying on these defenses, she will need to prove that she had taken every step to minimize loss to the company creditors and or that she at least took and followed expert advice. If she is unable to exonerate herself, the court will make an order against her.

Transactions defrauding creditors

The undervalue sale of company asset potentially also raises the issue of entering a transaction to defraud creditors, section 423. In addition to showing the undervalue sale it must be shown that the sale was designed to put the company's assets beyond the reach of creditor and /or to frustrate any claims that creditors may have against the company.

The liquidator could apply to the court for a repayment, accounting of profit, a restoration of the machines or for Rita to make a personal contribution to the company's assets.

Fraudulent trading

Another possible action by the liquidator lays in section 213. The liquidator will need to show that the company carried out the transaction with the intent to defraud its creditors carried out the transaction for any fraudulent purpose. If Rita's actions amount to fraudulent trading she may be ordered to contribute to the Company's assets.

Question 4.3 [maximum 4 marks]

The payments to Hard and Fast Ltd.

The payment to Hard and Fast Ltd. outside of the original terms of the contract, raises the issue of preference a prescribed under section 239 Insolvency Act 1986.

Section 239 is a 2-part test which addresses situations where a company pays a creditor or does things out of the company's desire to prefer that creditor, to put them in a better position than they would be in in the event of formal insolvency of the company. For example, before going into formal insolvency, paying a creditor in full in order to make that creditor better off than the other creditors of the same creditor class.

Commented [WPA12]: 0/4 unfortunately the s 239 argument is not feasible as the transaction took place after the commencement of the liquidation not at a point in time before it. Section 127 is the only possible cause of action.

Part 1 of the test is during a 'relevant time', paying a creditor or doing something which would financially benefit the creditor in the event of a formal insolvency. The 'relevant time' period, when the person receiving the benefit is a connected person, is within 6 months prior to the onset of the insolvency; and the 'relevant time', in the case of a non-connected person, is within the 2 years prior to the onset of the insolvency. For the purposes of the Insolvency Act 1986, a connected person is a director or shadow director, an associate of such director or shadow director and an associate of the company;- section 249.

Part 2 of the test is demonstrating a desire to prefer that creditor, to make them better off.

It appears that Part 1 of the test is satisfied. Rita paid Hard and Fast's outstanding debts in full one month before the Company entered formal insolvency.

However, it appears that Part 2 of the test is not satisfied. If the liquidator brings an action he will need to prove that there was a desire to prefer Hard and Fast, a desire to make them 'better off' than other creditors in the event of the formal insolvency. The liquidator may argue that the pressure exerted by Hard and Fast motivated the Company's actions and is therefore an expression of their desire. However, *Re McBacon Ltd.*¹ shows that the court will find that the pressure is irrelevant unless it is connected to the Company's desire to put Hard and Fast in a better position.

Rita's argument would be that paying Hard and Fast was based on commercial considerations. Hard and Fast is one of the Company's key suppliers and it was necessary to secure the continuance of the arrangement by paying their debts as they demanded so as to keep the business going and to maximise creditor's interests.

Accordingly, a section 239 action against Rita and the board is unlikely to succeed because the element of desire is not made out.

* End of Assessment *

¹ [1990] BCC 78