



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.**
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 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

Commented [WPA1]: 42/50 = 84% a very good effort

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

Commented [WPA2]: 8/10

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) 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

Commented [WPA3]: C is correct

(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.

Commented [WPA4]: D is correct

QUESTION 2 (direct questions) [10 marks]

Commented [WPA5]: 10/10

Question 2.1 [maximum 5 marks]

Commented [WPA6]: 5/5

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?

*[According to section 424 of the Insolvency Act 1986, the parties that may apply for an order under section 423 are:*

- a) *In the case where an entity has been made bankrupt or is being wound up or in administration*
  - *The official receiver*
  - *The trustee of the bankrupt's estate*
  - *The liquidator or administrator or a body corporate or*
  - *With leave of the court, a victim of the transaction.*
- b) *In the case of a voluntary arrangement,*
  - *the supervisor of the voluntary arrangement.*
  - *by any victim of the transaction*
- c) *In any other case, a victim of the transaction action may bring an action.*

*According to section 7 of the Company Directors Disqualification Act 1986, the following parties may apply for an order for a disqualification order once the conditions of section 6 are met:*

- a) *The Secretary of State*
- b) *The official receiver, if so directed by the Secretary of State in the case of a person who is or has been a director a company being wound up by the court in England and Wales*

*According to section 246ZC of the Insolvency Act 1986, Section 215 of the Insolvency Act 1986 applies for purposes of an application under section 246ZB. According to Section 215 of the Insolvency Act 1986, action may be brought by an administrator. (According to Section 264ZC of the Insolvency Act 1986, the reference in subsection (1) of section 215 to the liquidator applies as a reference to an administrator for purposes of proceedings brought under section 246ZB.)*

Question 2.2 [maximum 5 marks]

Commented [WPA7]: 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. Financial services debts - debts or other liabilities arising under a contract or instrument involving financial services,*
- 2. Employee debts,*
- 3. the monitor's remuneration or expenses*
- 4. redundancy payments*
- 5. rent in respect of a period during the Moratorium]*

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

Commented [WPA8]: 14/15

Question 3.1 [maximum 6 marks]

Commented [WPA9]: 6/6

**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?**

*[The appointment of an administrator does not automatically result in the termination of a company's executory contracts. Traditionally, certain contracts have had *ipso facto* or automatic termination clauses in which automatic termination was possible, however, these have now become the subject of increasing statutory exceptions making the clauses on automatic termination void in some cases. This means that an administrator who may wish to continue to operate the business of a company in administration may contact suppliers of good and services to continue to supply those goods and services during the administration as long as certain conditions are met.*

*An administrator looking to continue operating a business will require or need to obtain certain essential supplies such as gas, electricity, water and/or communication services, depending on the type of business the company is engaged in. Section 233 (2) of the Insolvency Act 1986 sets out the list of supplies considered essential where a company enters into an administration or other insolvency proceedings. Under section 233 (2) of the Insolvency Act 1986, suppliers:*

- a) May make it a condition that an officeholder, such as the administrator in this case, personally guarantees the payment of a supply*
- b) Are not permitted to require payment of outstanding debts in order to give supply to a company in administration.*

*Further, under Section 233A, a supplier providing such essential services is generally unable to rely on an "insolvency related term" in a contract to:*

- Terminate supply;*
- Alter terms of supply; or*
- Compel higher payments for continued supply.*

*Section 233B does not allow clauses which allow suppliers to terminate or "do any other thing" in relation to a contract if a company enters into a formal insolvency procedure such as administration. According to Section 233B, a provision is of no effect when a company enters into an administration procedure, if the contract terminates or allows the supplier to do any other thing once the company enters into an insolvency proceedings. Section 233B prevent suppliers from terminating supply due to insolvency and also prevents suppliers from requiring payment for supplies provided pre-insolvency before the supply of additional items. Under section 233B, a supplier cannot insist on a personal guarantee as a supplier may under section 233. A contract may be terminated by a supplier on the consent of an office holder or on application to the court where the court is satisfied that continuation of the contract could cause the suppliers hardship.*

*An administrator who wishes to continue operating a business of a company may therefore require suppliers to continue supplying goods under the provisions of Section 233, Section 233A and section 233B. However, it would not be prudent for an administrator to require continued supply of those goods without sufficient comfort*



*that the continued supply will cause not suppliers hardship as this could result in additional litigation for the administrator.]*

Question 3.2 [maximum 9 marks]

Commented [WPA10]: 8/9 an excellent answer but there is no mention of how creditors with fixed security are dealt with.

**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?**

*[Order of priority of payment in a liquidation:*

*A liquidator is only able to realize assets which belong to the company. Where debts are assigned to other parties such as a receivables financier or subject to hire purchase or retention of title, a liquidator does not have access to such assets.*

*The order or priority of payments and the nature of the rights enjoyed by each class of creditor/expense in a liquidation is set out below:*

Expenses of winding up

**According to section 115 of the Act, a number of expenses are given priority over a company's preferential creditors, holders of floating charges and other unsecured creditors. The following expenses are payable in priority and are payable in the following order of priority**

- a. *Expenses properly incurred by a liquidator to preserve, realize or get in any of the assets of a company, including the costs of any legal proceedings*
- b. *The costs 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 such as expenses incurred by members of the liquidation committee*
- e. *remuneration of any person employed by the liquidator to person any services for the company*
- f. *the remuneration of the liquidators*
- g. *the amount of any corporation tax on chargeable gain accruing on the realization of any asset of the company*
- h. *any other expenses properly chargeable by the liquidator in carrying out the liquidator's functions.*

Preferential creditors

**A liquidator must note that the terms of a CVA cannot alter the priority of preferential creditors. Preferential creditors are paid once expenses of the liquidation have been paid and before the floating charge holders and unsecured creditors are paid. Preferential creditors are mainly comprised of certain employee claims and tax liabilities.**

*There are two classes of preferential debts, ordinary preferential debts and secondary preferential debts. Ordinary preferential debts are paid before secondary preferential debts.*

*Preferential debts rank equally amongst themselves in their respective classes. If assets are insufficient to pay preferential debts in full, the preferential debts are paid in equal proportion. According to Schedule 6 of the Act, the following debts are preferential debts:*

- 1. Sums owed with respect to an employee's contribution to an occupational pension scheme for earnings paid in the period of four months prior to the commencement of the winding up*
- 2. Sums owed on account of an employer's contribution to an occupational pension scheme in the period of 12 months before the commencement of the winding up*
- 3. Remuneration owed by the company to an individual who is or has been an employee of the company and is payable for the four months prior to the commencement of the winding up to a maximum of GBP 800.*
- 4. Amount owed by the company with respect to holiday remuneration for any period of employment before the winding up. Remuneration in respect of a period of holiday or absence from work due to sickness or other good cause is considered to be wages*
- 5. Claims for monies advanced to pay wages or holiday remuneration rank as preferential. This applies where a lender's funds may have been used to pay wages or holiday remuneration for employees in the case the lender had not made the funds available for that specific purpose*
- 6. Levies on the production of coal and steel as per article 49 and 50 of the European Coal and Steel Community Treaty*
- 7. Claims for any amount to be paid by the company under the Reserve Forces (Safeguard of Employment) Act 1985*

*Certain preferential debts have been added to the regime relating to payments which may have been made to parties with deposits where the financial institution holding the deposits has become insolvent and compensation has been made by the Financial Services Compensation Scheme to the depositors. The following are preferential debts with respect to such cases:*

- 8. The amount of any deposit owed by the company in respect of an eligible deposit as long as the amount does not exceed the amount that would be payable in respect of the deposit under the Financial Services Compensation Scheme to the party*
- 9. The amount owed by the company to one or more persons in respect of an eligible deposit as exceeds any compensation that would be payable in respect of the deposit under the FSCS.*
- 10. Any amount owed by the company to one or more eligible persons in respect of a deposit that:*
  - a. Was made through a non-UK branch of a credit institution authorized by the competent authority of the UK*

***b. Would have been an eligible deposit if it had been made through a UK branch of the credit institution***

***11. PAYE income tax deductions, national insurance deductions, VAT payments, construction industry scheme deductions and student loan repayments.***

***The debts in point 9, 10 and 11 are the debts that are defined as secondary preferential debts under section 386 of the Act and are paid after the ordinary preferential debts (1-8) have been paid.***

Floating charge holder(s) and the prescribed part:

***Floating charge holders are paid after preferential creditors. In the case there is more than one floating charge holder, priority is determined by which floating charge was created prior (i.e. the floating charge that was created first). A liquidator must first consider whether Section 176A of the Insolvency Act 1986 is applicable to the distribution being made. Section 176A applies to floating charges created on or after 15 September 2003 where the company has gone into liquidation.***

***A liquidator is required to set aside a "prescribed part" of a company's net property available for the benefit of unsecured creditors and must ensure that this prescribed part is not distributed to floating charge holders unless it is in excess of the amount required to settle all unsecured debts. i.e. if the prescribed part is higher than the unsecured debts of the company, the amount that is in excess of the secured debts may be used to settle the debts of floating charge holders.***

***In the event that a company's net property is not more than GBP 10,000, the prescribed part is 50% of the property. Where the property is less than GBP 10,000, should a liquidator determine that making a distribution to unsecured creditors would be "disproportionate" to the benefits, the liquidator does not have a duty to make a distribution of the prescribed part.***

***Where the property of a company exceeds GBP10,000 the prescribed part is the sum of 50% of the first GBP 10,000 in value plus 20% of the excess in value above the GBP 10,000. The prescribed part is subject to a maximum amount of GBP 800,000.***

***A floating charge holder, or any secured creditor, who still has an outstanding unsecured balance owing to them after distribution is not permitted to participate in the distribution of the prescribed part. The prescribed part is therefore only payable to fully unsecured creditors.***

Unsecured creditors

***These are creditors with no security, often trade creditors. Unsecured creditors are paid out last in the prescribed statutory order. In most cases, once the expenses of a liquidation have been paid and a distribution has been made to secured and preferential creditors, there is usually a little amount or sometimes nothing left to pay a dividend to unsecured creditors.***

*Unsecured creditors may also receive payment from the prescribed part, if any, that is set aside for distribution to unsecured creditors. No other creditors, other than unsecured creditors may benefit from the prescribed part.*

Shareholders

*If there are sufficient funds to pay the other classes of creditors, any surplus will be distributed amongst the shareholders based on the company's constitution. In most cases, a company's constitution will permit a pro rata distribution to shareholders based on their respective shareholdings in the company.*

*If the company had been subject to a Moratorium but entered into administration within 12 weeks of the end of the Moratorium, the priority of debts in the liquidation will be different as a result of the debts that existed during the Moratorium. All Moratorium debts and certain pre-moratorium debts will be considered "super-priority" debts in the liquidation. Section 174A provides that certain unpaid pre-Moratorium or Moratorium debts which were not part of the payment holiday such as employee debts and debts relating to financial services are paid in the liquidation and have "super priority" to liquidation expenses such as liquidator's fees and expenses. As per Section 174A certain unsecured debts will be considered "super priority" debts in a liquidation.*

*The Moratorium debts which are not part of a payment holiday and which may receive super-priority in the event of a liquidation are:*

- a) A monitor's remuneration or expenses*
- b) Goods or services supplied during the moratorium*
- c) Rent due in respect of a period during the moratorium*
- d) Wages or salary arising under a contract of employment*
- e) Redundancy payment*
- f) Debts or other liabilities under a contract or other instrument involving financial services]*

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

Commented [WPA11]: 10/15

***Prior to going into compulsory liquidation on 23<sup>rd</sup> 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 14<sup>th</sup> 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 (September 2022), 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 [WPA12]: 5/5

**The floating charge in favour of Fretus Bank plc;**

*[According to Section 245 of the Insolvency Act 1986, certain floating charges may need to be avoided. The provision is aimed at preventing pre-existing unsecured creditors from creation of security, such as a floating charge shortly before a company enters into a formal insolvency procedure. The section does not prevent lenders who are providing new funding to the company from taking a floating charge for the new funding. However, the section renders invalid charges given by a company at a relevant time, except to the extent that new consideration is provided for the charge i.e. where a charge is created but there is not new consideration is provided, the floating charge may be avoided.*

*Where a floating charge is created in the favor of a person that is deemed to be connected with the company, the relevant time is the period of two years prior to the start of the insolvency. Where a floating charged is created in favour of a party that is not connected, the relevant time is 12 months prior to the onset of insolvency. However, this is only if at the time of the charge the company was unable to pay its debts or became unable to do so in consequence of the transaction.*

*In order for a charge to remain valid and not be invalid, the following conditions need to be satisfied:*

- a. The value of so much of the consideration for the creation of the charge as consists of money paid, or goods or services supplied, to the company at the same time as, or after, the creation of the charge. This means that the consideration must be given at the same time or soon after the creation of the charge.*
- b. The value of so much of that consideration as consists of the discharge or reduction, at the same time as, or after, the creation of the charge, or any debt*

*of the company. This means that the floating charge is valid to the extent of consideration by way of discharge or reduction of debt of the company.*

*In the case of the floating charge created in favour of Fretus bank, it was created within the 12 month period before the relevant date. However, we do not have any information on whether there was any new funding provided to the Company. In the event there was no new funding and the conditions in Section 245 of the Insolvency Act 1986 are not met, the floating charge may be invalidated. The liquidator may invalidate the floating charge, however, the underlying debt will remain valid.]*

**Question 4.2** [maximum 6 marks]

**Commented [WPA13]:** 5/6 a very good answer but needed to explain the presumption of insolvency as connected person sale

**The sale of the marble cutting machines; and**

*Transactions entered into shortly before the formal insolvency are open to attack and may be reviewed further by an office holder. Under section 238 of the Act, a liquidator or administrator may attack a transaction entered into prior to the company entering liquidation or administration where a transaction was at an undervalue. In order for a liquidator to do this, a liquidator must show that the company:*

- *Made a gift to another person*
- *Entered into a transaction with another person on terms that provided for the company to receive no consideration*
- *Entered into a transaction with another person for a consideration which, in money or money's worth was at the date of the transaction was less than the value of the consideration provided by the company.*

*The relevant period for purposes of reviewing transaction carried out at undervalue is the period of two years prior to the commence of the liquidation.*

*It is a prerequisite of liability under section 238 that at the time the transaction is entered into, the company was unable to pay its debts as they fell due within the meaning of section 123 or became unable to pay its debts within the meaning of section 123 as a result of the transaction.*

*In the case of Marble Q Limited, it appears that the company was already experiencing cashflow challenges, at the time that the directors were entering into the transaction. Additionally, the assets were sold for less than half of the price for which they were bought in the previous year. It therefore appears that the transaction was an undervalue transaction. The liquidator may be able to take action under section 238 as the transaction appears to be a transaction at undervalue.*

*The transaction will be deemed not to be an undervalued transaction if the directors can satisfy the court that the transaction was entered into by the company in good faith for the purpose of carrying on its business and that at the time there were reasonable grounds to believe that the transaction would benefit the company. The liquidator will*

*need to investigate further whether the transaction was carried out under such circumstances.*

*The period of July 2022 falls within the relevant period which is two years and therefore the transaction may be reviewed further. ]*

**Question 4.3 [0]**

***The payments to Hard and Fast Ltd.***

*[According to section 233 and section 233B of the Act, a supplier must not demand payment for sums owing before the supplier can provide new supply or continues to provide supply to an office holder. However, where the services provided are deemed to be essential under section 233 of the Act, a supplier can demand that an office holder provides a personal guarantee in respect of new supplies provided.*

*Section 239 of the Act, provides conditions with which certain transactions may be avoided by a liquidator or an administrator. The underlying purpose of section 239 is to prevent the Company from placing one of its creditors in a better position than others shortly before entering into an insolvency proceeding.*

*Section 239 provides that preferences include situations such as a payment in full where the creditor could have expected only a dividend as an unsecured creditor. The section also opens up any security given to a creditor, or any other property of the company made available to a creditor to attack, especially where the creditor was an unsecured creditor.*

*Under section 239, where a company has gone into liquidation, an application to show preference must show that:*

- *The person who it is alleged has been preferred was, at the time of the transaction, a creditor of the company;*
- *Something was done, or suffered to be done, by the company which had the effect of putting that person in a better position, in the event of the company going into insolvent liquidation, that the position the party would have been in if the company had not gone into insolvency.*
- *The company was, in giving the preference, influenced by a desire to produce the effect referred to in the condition above,*
- *The preference was given at a relevant time.*

*The relevant time for purposes of a preference in favour of a person not connected to the company is six months prior to the onset of insolvency.*

*It is also a requirement that the company was unable to pay its debts as they fell due under section 123 or became unable to pay its debts within the meaning of that section 123 of the Act. The office holder must also establish the need to show the company was influenced by the desire to prefer the creditor.*

**Commented [WPA14]:** 0/4 unfortunately, s 239 cannot apply here as the payments were made after the commencement of the liquidation. The liquidator would use s 127 to avoid the dispositions of company money.

*Where a company is influenced by a commercial consideration and not the desire to prefer, it may be deemed by the court that there was no desire to prefer.*

*The liquidator in this case would therefore need to ensure that the decision to prefer it was a commercial consideration and there was no intent to give Hard and Fast preference in a manner that would result in them being in a better position than they would be in their capacity as unsecured creditors.]*

**\* End of Assessment \***