



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

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]: 42/50 = 84% a generally very good piece of work

Commented [WPA2]: 8/10

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.

Commented [WPA3]: B is correct

Question 1.8

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

- (a) 6
- (b) 8**
- (c) 10
- (d) 12

Commented [WPA4]: C is correct

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 [WPA5]: 10/10

Question 2.1 [maximum 5 marks]

Commented [WPA6]: 5/5 the OR on the instructions of the SoS may also bring action under s 6.

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: **The following parties have the right to attack transactions which are designed to defraud creditors: (a) where the company is being wound up or is in administration, the official receiver, the liquidator, the administrator and (with leave of the court) any victim of the transaction such as a creditor; (ii) where the victim is bound by a company voluntary arrangement ("CVA"), the supervisor of the CVA or any victim of the transaction (whether bound by the CVA or not); or (iii) in any other case, by a victim of the transaction.**

Section 6 Company Directors Disqualification Act 1986 (CDDA): **A liquidator or administrator has a statutory duty to report directors who may be unfit to be directors under the CDDA. The Secretary of State may then decide, based on such a report, to take action against directors by applying to disqualify them under, *inter alia*, s 6 CDDA.**

Section 246ZB of the Insolvency Act 1986: **An administrator in an insolvent administration.**

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.

Pursuant to s A18 of the Insolvency Act 1986, five such debts are amounts payable in respect of (a) the monitor's remuneration or expenses; (b) goods or services supplied during the Moratorium; (c) rent in respect of a period during the Moratorium; (d) wages or salary arising under a contract of employment; and (e) redundancy payments.

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

Commented [WPA8]: 14/15

Question 3.1 [maximum 6 marks]

Commented [WPA9]: 6/6 very good

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, the administrator can. There are three key provisions under the Insolvency Act 1986 ("the Act") that prevent suppliers from terminating the supply of goods and services by reason of the company entering into administration.

First, under s 233(2)(b) of the Act, if the administrator makes a request for the supply of gas, water, electricity or communications services (as defined in s 233(3) to 233(3A) of the Act) ("essential goods and services"), the supplier is not allowed to "make it a condition of the giving of the supply, or do anything which has the effect of making it a condition of the giving of the supply, that any outstanding charges in respect of a supply given to the company before the effective date are paid". That said, pursuant to s 233(2)(a) of the Act, the supplier may make it a condition of the giving of the supply that the administrator personally guarantees the payment of any charges in respect of the supply.

Second, s 233A(1) of the Act provides that an “insolvency-related term” in a contract for the supply of essential goods and services will cease to have effect if the company enters administration. Briefly, an “insolvency-related term” is defined in s 233A(8) of the Act and refers to a provision that (a) terminates the contract or provides that any other thing would take place by reason of the company entering into administration; or (b) entitles the supplier to terminate the contract or supply or to do any other thing, by reason of the company entering into administration or because of an event occurring before the administration.

That being said, under s 233A(4) of the Act, the supplier may still terminate the contract with the administrator’s consent, the court’s permission (if the court is satisfied that continuation of the contract would cause the supplier hardship), or if any charges incurred after the company entered administration are not paid within 28 days from the time when payment became due. Alternatively, the supplier may terminate the contract under s 233(5) of the Act by giving written notice to the administrator that supply will be terminated unless the administrator personally guarantees the payment of any charges, and such a guarantee is not provided within 14 days.

Third, in relation to the supply of goods and services generally, s 233B(3) of the Act provides that a provision in a contract will cease to have effect when the company enters administration if that provision would, by reason of the company’s administration, (a) terminate the contract or supply, or any other thing would take place; or (b) entitle the supplier to terminate the contract or supply, or to do any other thing. Section 233B(4) further provides that where the supplier is entitled to terminate the contract by reason of an event occurring before the administration, the entitlement shall not be exercised for the period that the company is in administration. In addition, the supplier is not allowed to make it a condition of continued supply of goods and services after the company enters administration, or to do anything which has the effect of making it a condition of such a supply, that any outstanding charges in respect of a supply made to the company before that time are paid (s 233B(7) of the Act).

That said, the supplier may nonetheless terminate the contract with the administrator’s consent, the company’s consent, or if the court is satisfied that the continuation of the contract would cause the supplier hardship and grants permission for the termination of the contract (s 233B(5) of the Act). Notably, s 233B does not permit a supplier to ask for a personal guarantee from the administrator. It should also be noted that pursuant to s 233B(10) and Schedule 4ZZA of the Act that certain suppliers are excluded from the operation of s 233B (eg, insurers, banks, electronic money institutions).

Question 3.2 [maximum 9 marks]

Commented [WPA10]: 8/9 a very clear and full answer. Some detail around different preferential debts 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?

Secured creditors will usually enforce their security outside of any formal insolvency proceedings. The nature of their right to repayment will therefore be contractual/proprietary and is based on the instrument that created the security in the first place. Unsecured creditors and floating charge holders will be subject to the statutory order of priority, which is described below. The nature of their right to repayment is therefore at least partly statutory in nature (though the initial basis for the debt is likely to be contractual, eg a contract for the sale of goods).

First priority: Expenses of the liquidation

Under s 115 of the Insolvency Act 1986, all expenses properly incurred in the winding up are payable out of the company's assets in priority to all other claims. Rules 6.42(4) of the Insolvency Rules 2016 (the "Rules") describes the specific order in which specific expenses of the liquidation must be paid out in a creditor's voluntary winding up, while r 7.108 of the Rules describes the same in relation to a winding up by the court. The following main expenses are accorded first priority (in order of priority):

- (a) expenses which are properly chargeable or incurred by the liquidator in preserving, realising or getting in any of the assets of the company;**
- (b) the cost of any security provided by the liquidator;**
- (c) any amount payable to a person to assist in the preparation of a statement of affairs or accounts;**
- (d) necessary disbursements by the liquidator in the course of winding up (eg expenses incurred by members of the liquidator committee);**
- (e) remuneration of any person employed by the liquidator to perform any service for the company;**
- (f) remuneration of the liquidator;**
- (g) corporation tax chargeable on gains accruing on the realisation of any asset of the company; and**
- (h) any other expenses properly chargeable by the liquidator in carrying out the liquidator's function in the winding up.**

Second priority: Preferential creditors

Next, pursuant to s 175 of the Insolvency Act 1986, the company's assets are used to pay preferential creditors. Per ss 175(1A)-(1B), ordinary preferential debts are paid in priority to secondary preferential debts. Both types of preferential debts rank equally among themselves and shall be paid in full unless the company's assets are insufficient, in which case they abate in equal proportions. "Preferential debts" are defined in s 386 of the Insolvency Act 1986 - in particular, "ordinary preferential debts" are defined to refer to any preferential debts listed in any of paragraphs 8 to 15B of Schedule 6, while

“secondary preferential debts” are defined to mean any of the preferential debts listed in paragraph 15BA, 15BB or 15D of Schedule 6.

The relevant date which is used to determine the existence and amount of a preferential debt is defined in s 387 of the Insolvency Act 1986.

Third priority: Prescribed part and Floating charge holders

Next, before the liquidator makes any distributions to floating charge holders, s 176A(2) of the Insolvency Act 1986 requires the liquidator to make a prescribed part of the company’s net property available for the satisfaction of unsecured debts, and to not distribute that part to the proprietor of a floating charge except in so far as it exceeds the amount required for the satisfaction of unsecured debts. That said, s 176A(2) does not apply to (a) floating charges created before 15 September 2003 (see definition of “floating charge” in s 176A(9)); (b) if the company’s net property falls below the prescribed minimum of £10,000 and the liquidator thinks that the cost of making a distribution to unsecured creditors would be disproportionate to the benefits (s 176A(3)); or (c) the court orders that s 176A(2) shall not apply.

“Net property” is defined in s 176A(6) to mean the amount of the company’s property which would be available for satisfaction of claims of holders of debentures secured by, or holders of, any floating charge created by the company.

If the company’s net property does not exceed £10,000 then the prescribed part is 50% of that property; if it does then the prescribed part is 50% of the first £10,000 in value, plus 20% of the excess in value above £10,000, subject to the maximum cap of £800,000.

Subject to the application of s 176A of the Insolvency Act, the next creditors to be paid are floating charge holders. If there is more than one floating charge holder, priority will be given to the floating charge that was created first.

Fourth priority: Unsecured creditors and shareholders

Next, unsecured creditors are the last of the creditors to be paid out. If there are any remaining assets after all creditors have been paid, the assets are distributed to shareholders according to the company’s constitution, which will normally permit a distribution *pro rata* to the shareholder’s respective shareholdings.

If the company had been subject to a Moratorium

If the company had been subject to a Moratorium during the 12-week period prior to the liquidation, then pursuant to s 174A(2) of the Insolvency Act 1986, certain unsecured debts would acquire “super priority” in the liquidation. In particular, the following debts acquire priority over all other claims (in order of priority shown): (a) any prescribed fees or expenses of the official receiver

acting in any capacity in relation to the company; and (b) moratorium debts and priority pre-moratorium debts. "Priority pre-moratorium debt" is defined in s 174A(3) to mean (a) any pre-moratorium debt payable in respect of the monitor's remuneration or expenses, goods or services supplied during the moratorium, rent in respect of a period during the moratorium, or wages or salary arising under a contract of employment, so far as relating to a period of employment before or during the moratorium; (b) any pre-moratorium debt that consists of a liability to make a redundancy payment, and fell due before or during the moratorium; and (c) any pre-moratorium debt that arises under a contract or other instrument involving financial services, fell due before or during the moratorium, and is not relevant accelerated debt.

Section 174A(4) defines "relevant accelerated debt" to mean any pre-moratorium debt that fell due by reason of the operation of, or the exercise of rights under, an acceleration or early termination clause in a contract or other instrument involving financial services, during the relevant period stated in s 174A(4)(a)-(b).

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

Commented [WPA11]: 10/15

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]

The floating charge in favour of Fretus Bank plc;

The floating charge may be avoided under s 245 of the Insolvency Act 1986 (the "Act"). Section 245 provides that a floating charge on the company's undertaking is invalid if it was created 12 months prior to the onset of insolvency, and at a time when the company was unable to pay its debts (within the meaning of s 123 of the Act) or became unable to do so as a result of the transaction. This is the case unless the floating charge is created for fresh consideration, namely (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; or (b) the value of so much of the consideration as consists of the discharge or reduction, at the same time as or after the creation of the charge, of any debt of the company.

In the present case, given that the floating charge was granted to Fretus Bank shortly before Marbley Q ("MQ") went into liquidation on 23 December 2022, and presumably after the creditor's winding up petition was presented on 14 October 2022, MQ was likely unable to pay its debts at the time the floating charge was granted. No fresh consideration was offered by Fretus in exchange for the floating charge. In the circumstances, the floating charge over MQ's undertaking is invalid.

Question 4.2 [maximum 6 marks]

The sale of the marble cutting machines; and

The sale of the marble cutting machines may potentially be set aside under s 238 of the Insolvency Act 1986. Under s 238, a transaction may be set aside after the commencement of liquidation, if it is entered into at a "relevant time" with any person at an undervalue. Per s 238(4), a transaction is at an undervalue if (a) the company makes a gift or otherwise enters into a transaction for no consideration; or (b) the company enters into a transaction 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 240(1) provides that a transaction is entered into at a "relevant time" it is entered into two years prior to the onset of insolvency (defined to include the date of commencement of winding up in s 240(3)). Further, the company must be unable to pay its debts within the meaning of s 123 of the Act at the time the transaction is entered into, or must become unable to pay its debts as a result of the transaction - that said, these

Commented [WPA12]: 4/5 a good answer on the law but the application to the facts seems to misidentify when the charge was executed.

Commented [WPA13]: 6/6 very good

requirements are presumed to be satisfied if the transaction is entered into with a connected person of the company, unless the contrary is proven (s 240(2)).

In the present case, the sale of the marble cutting machines may possibly have occurred at an undervalue, given that they were acquired only a year ago for GBP 25,000 but were sold for the much lower value of GBP 10,000. The transaction also occurred within two years of the commencement of liquidation. Further, Rita Perkins ("RP") is arguably a connected person to MQ, given that she is a director. The transaction may therefore be presumed to have been entered into at a time when the company was unable to pay its debts, or to have resulted in MQ being unable to pay its debts. There is nothing on the facts to suggest the contrary, especially since the transaction occurred in July 2022 when MQ was facing cash flow problems, and MQ entered into liquidation about six months after. If the court is satisfied that there was a transaction at an undervalue, it will make an order restoring the position to what it would have been but for the transaction. In this case, such an order would likely entail compelling RP to return the market value of the marble cutting machines at the time the transaction was entered into, less the amount she paid to MQ for the machines (i.e, GBP 10,000).

That said, a court will not make an order under s 238 if it can be shown that the transaction was entered into by the company in good faith and for the purpose of carrying on its business, and that at the time there were reasonable grounds for believing that the transaction would benefit the company. In the present case, RP may claim that the transaction was *not* at an undervalue, if it can be shown that the value of the marble cutting machines drastically depreciated in value due to wear and tear / prevailing market conditions etc. RP may also contend that the transaction was done in good faith and for the benefit of the company, as the company was urgently in need of funds and the injection of GBP 10,000 into the company would have reasonably allowed the company to carry on its business for longer. Whether this argument is accepted by the court would ultimately depend on the facts and the precise circumstances under which the transaction was entered into.

Question 4.3 [maximum 4 marks]

The payments to Hard and Fast Ltd.

The payments could be challenged as being preferences under s 239 of the Act, but establishing this will likely be difficult. In order to succeed on an application under s 239, the liquidator must show that:

- (a) the person who was allegedly preferred was, at the time of the transaction, a creditor of the company;**
- (b) 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**

Commented [WPA14]: 0/4 the payments were made after the commencement of the liquidation and so s 239 cannot apply. Section 127 would operate to make the payments void.

going into insolvent liquidation, than the position he or she would have been in had that thing not been done;

(c) the company was in giving the preference, influenced by a desire to produce the effect referred to in (b) above;

(d) the preference was given at a relevant time.

The burden of proving the above is on the liquidator, unless the person preferred was a connected person to the company (in which case the burden reverses). In determining whether a company preferred a creditor, it should be noted that any pressure applied by the creditor is not relevant. Any pressure from the creditor is only relevant to considering if there was a desire to prefer.

As for the "relevant time", s 240 of the Act provides that the preference must have occurred within two years prior to the onset of insolvency if the person preferred was a connected person, or within six months prior to the onset of insolvency if the person was not connected to the company. Further, the company must have been unable to pay its debts within the meaning of s 123 of the Act at the time of the preference, or must have become unable to pay its debts as a result of the preference.

*With regard to the need to show a desire to prefer, it should be noted that a desire to prefer is distinct from an intention to prefer: *Re MC Bacon Ltd* [1990] BCC 78. An intention to grant security to a creditor will necessarily involve an *objective* intention to prefer, but does not itself amount to a *subjective* desire to prefer. It may also be observed that a decision driven by commercial considerations does not mean a desire to prefer. For instance, in *Re MC Bacon Ltd*, Millett J found that the granting of a debenture to the company's bank to secure past indebtedness did not amount to a preference. This was because the company had been entirely dependent on the bank's support for continued trading, such that if the debenture were not granted, the bank would withdraw its support and force the company into immediate liquidation. The granting of the debenture was therefore motivated by a desire to avoid the calling in of the overdraft and a desire to continue the company's trading, rather than a desire to prefer. It has also been held in subsequent cases that where a company was solely influenced by commercial considerations, specifically attempts to ensure that the company continued trading, there can be no desire to prefer. Where the preference is given to a connected person, the desire to prefer will be presumed unless the contrary is shown.*

In the present case, the payments were made to Hard & Fast Ltd ("HF"), who was one of MQ's creditors. The payments had the effect of placing HF in a better position than other unsecured creditors, as HF received immediate payment of GBP 8,000 for past debts, and upfront payment of GBP 3,000 for the supplies it delivered in the month prior to the commencement of winding up. The payments also occurred at a relevant time, given that they occurred in the six months prior to winding up, and MQ was ostensibly unable to pay its debts at

that time (given that winding up commenced a month after). That said, it may be difficult to establish that there was a requisite desire to prefer - HF is not a connected party, and so the desire to prefer cannot be presumed. On the facts, it may be argued that MQ's decision to pay HF was driven by purely commercial considerations. Given that HF was one of MQ's key suppliers, any termination in supply from HF (as a result of MQ's non-payment of past debts) may cause serious disruptions to MQ's business, and force MQ into immediate liquidation. In the circumstances, it may be difficult to establish that the payments were done as a result of desire to prefer HF.

*** End of Assessment ***