**SUMMARY QUESTIONS**

**ESSAY QUESTIONS**

1. What are the various charges that a lender may require to be provided by the company that wishes to borrow money? Explain the nature of each, their priority, and their effect in the event of the company being wound up.

**Indicative content outline answer:**

* A charge is a contractual agreement in the form of security (on certain assets) on a loan. The borrower agrees to allow the rights over property to be transferred to the lender on the basis that if the loan is unpaid, the lender will be able to dispose of the property and secure the return of the loan.
* Where such a charge is not made, the issue of limited liability may remove the shareholders’ personal responsibility to contribute, beyond the value of the shares or any guarantees made, and the lender, if the borrower (for example a company) has insufficient funds to repay all of its debts, will have to join the remaining creditors and may not realise all of the money it is owed. Hence charges are a valuable way in ensuring, as far as possible, that loans are secured on tangible property.
* Faced with a situation where the borrower does not repay the debt, the lender with a charge over property may choose to bring an action for breach of contract, or they may choose to dispose of the assets to which they possess a charge. If, in this disposal, there is more money generated than is owed, then following deductions for expenses in selling the property, it must be returned to the borrower.

### *Fixed Charges*

* The nature of a fixed charge is that it is ‘fixed’ to a particular asset owned by the borrower which may be real property or personal property and it provides the lender with a proprietary interest over the asset.
* The benefit of the fixed charge for the lender, and a reason why he/she may pursue such a charge in determining whether to loan money, is the control over the property. It therefore represents the best form of security. The borrower may be prevented from selling the property that is subject to the charge until the loan is repaid, and the charge remains until the loan is fully repaid. Further, a lender with a fixed charge is generally considered to be above preferential creditors and creditors who possess floating charges.

### *Floating Charges*

* A fixed charge therefore may involve (for example) a bank providing a loan to a company on the basis that it holds a charge over the company’s factory. The company may use the factory although it cannot sell it without the bank’s authorisation, and insofar as the company continues to make the required repayments, the bank will take no further action.
* As opposed to a charge that is fixed to a particular asset, the borrower may apply the charge to a group of assets (such as the stock with which the company trades). The benefit for the borrower in this scenario is that they are free to trade in the goods / assets subject to the floating charge, and in the event of non-payment of the loan when it is due, the charge becomes fixed or ‘crystallises’ over them.
* At this stage, the lender has the ability to dispose of the goods in the same way as someone with a fixed charge. Crystallisation occurs where a receiver is appointed; if the company goes into administration or is wound-up; or where an event that was provided for in the contract establishing the floating charge occurs. Once crystallisation occurs and the assets are traded after this event, the holder of the charge may bring an action against the party to whom they were transferred.
* Clearly, unlike a fixed charge where the charge is applied to a specific asset, the floating charge, by its nature, does not apply to a specific asset. As such, the borrower appears to be in possession of the assets and may appear to be more credit worthy than they actually are. To prevent fraud, and perhaps a situation of the borrower attempting to obtain loans on the assets subject to the floating charge, protection is afforded through a system of registration.

# *Registration of Charges*

* A charge must be registered with the Registrar within 21 days of its creation. The company is obliged to provide the Registrar with this information but it is also possible for the person interested in the registration to register it. The Registrar will then issue a certificate of registration and include details as to its particulars. This is because where a charge is not registered, it will be invalid and it will not allow the creditor to have the right to dispose of the assets to which the charge was to relate.
* This does not mean that the creditor would be unable to bring an action against the company on the debt owed, but they would lose the security that the charge provides.
* A secured creditor will have a greater opportunity (and priority) to have debts owed satisfied. However, it is possible to state that a fixed charge will rank below an existing floating charge, and hence it will rank below such creditors and behind preferential creditors (*Re Portbase Clothing Ltd*).
* It is possible to grant more than one fixed charge over assets (particularly where the asset has significantly grown in value and hence could accommodate such charges). More than one charge may also be made over a floating charge, however when this occurs, they rank in the order that they were created (hence preventing the company establishing a fraud on the previous creditors through subsequent actions).

# *Priority of Charges*

When the company is wound-up, the owners of a charge will wish to secure the property to which the charge relates. The hierarchy of charges is as follows:

* If the charges have been correctly registered, they rank in priority as follows. A fixed charge will rank higher than existing floating charges unless the existing floating charge has made provision against this.
* Fixed charges also have effect from the time they are created. The next level of charge is a floating charge and this takes effect when it crystallizes and attaches to the assets in the agreement. They will also have priority when the charge was created (hence the first floating charge will have priority over the last one created over the same asset, unless this is stated to the contrary).
* Finally, preferential creditors take priority over the holders of floating charges, but not over fixed charges.

2. Explain the process of a company altering its share capital. Provide examples of why a company may wish to make such an alteration and how the creditors of the company are protected against abuse of this provision.

**Indicative content outline answer**

* Whilst a private company is not required to have any prescribed amount of share capital, compared with a public company’s requirement of £50,000, it will identify its share capital on formation but may, at a later date, wish to vary this amount in light of its changing circumstances.
* Generally a company is prevented from doing so (s. 617) although there are exceptions where the company wishes to increase its share capital by allotting new shares; reduce its share capital in accordance with Chapter 10 of the CA 2006; where it wishes to sub-divide or consolidate all or any of its shares; where it wishes to reconvert stock into shares; or where it wishes to redenominate any or all of its shares.
* Where a company wishes to allot new shares, a contract has to be established between the parties that identifies the important information such as the amount of capital involved, when this capital is to be contributed, the nature and class of the shares to be allotted, and when the shares will provide the allottee with their rights attached to the shares.
* Chapter Two of the CA 2006 governs the allotment of shares and identifies the authority of directors allot.
* Where a private company has only one class of share, the director(s) is empowered to allot shares in the company unless the articles prevent this.
* Where a company has more than one class of share, or the company is a Plc, there must be authority provided by the company’s articles or through a resolution of the company. This authority may be conditional or unconditional, and it must state the maximum amount of shares that may be allotted, and specify the date on which the power will expire (which must not be more than five years from the date of incorporation (where the power is from the company’s articles) or the date that the resolution was passed).
* To maintain the company’s capital, it is not permitted to issue the shares at a discount.
* Having allotted shares, the company must inform the Registrar (of Companies) as soon as practicable and in any event within two months after the date of allotment, and within one month of making the allotment, the company must deliver to the Registrar a return of allotment detailing the statement of capital.
* Shares may be consolidated for convenience by altering shares that were issued in small denominations into larger amounts. This does not change the percentage of the total number of shares.
* Sub-dividing is the contrary situation and involves the shares being ‘reduced’ into smaller denominations. The company is empowered to make such a change where the members pass an ordinary resolution to that effect (although the company’s articles may require a higher majority or may exclude or restrict any power conferred by the CA 2006).
* If the company does make such a change, it must inform the Registrar within one month of having made the change along with a statement of capital (detailing the total number of shares of the company; their nominal value; the amounts of paid and unpaid shares and so on).
* Where the shares are to be redenominated, the company’s articles may impose restrictions and the members must pass a resolution authorising this (which may specify conditions that must be met before the redenomination takes effect).
* This will include details such as the exchange rate utilised and the redenomination must take place within 28 days, ending on the day before the resolution was passed. Following the redenomination, the company must notify the Registrar of the changes within one month after doing so, including a statement of capital and, within 15 days of the resolution being passed, a copy of the resolution.

### *Reduction of Share Capital*

* A company may seek to reduce its share capital because its assets had permanently decreased in value, it may be a tactic to eliminate book debts, or to return capital to shareholders where the capital involved is surplus to the company’s requirements and so on.
* A private company may achieve a reduction in the share capital by a special resolution supported by a solvency statement, however, the reduction must still leave at least one member with a share(s) that is not a redeemable share.
* Private and public companies may, through a special resolution confirmed by the court, reduce their share capital, however, the company may have provisions in the articles that restrict or prohibit such a reduction.
* The private company that wishes to reduce its share capital, supported by a statement of solvency, requires the directors of the company to make the statement not more than 15 days before the date on which the resolution is passed, and the resolution and the statement are registered in accordance with s. 644.
* Where a court confirms the reduction, it may order the company to publish the reasons for the reduction, or other information that it thinks fit to give proper information to the public. It may also require the company, where special reasons exist, to add to its name the words ‘and reduced’ during a period specified in the court’s order. When the court has provided its order confirming the reduction, the Registrar will register the order and the statement of capital.

**PROBLEM QUESTIONS**

1. Michelle and Raj operate a bistro business called Café Culture Ltd in Manchester. They have run the business largely by attempting to build solid foundations through paying themselves a relatively small salary and reinvesting any profits back into the business. The business was originally a partnership, but the two owners later incorporated as a private limited company, with Michelle owning 60 per cent of the shares and Raj 40 per cent (and both are directors). Despite their initial introduction of capital, Michelle and Raj wish to increase the growth of the business and so allow Charlie to purchase 20 per cent of Café Culture Ltd’s shares (with a reduction of Michelle’s and Raj’s shareholding by 10 per cent each).

Upon taking a shareholding in the company Charlie stated that she had no wish to become a director but she did expect to receive an income from the dividends paid to shareholders. Café Culture Ltd makes a profit each year and it has substantial sums in its account (some £400,000) but the directors choose, for the third consecutive year, not to declare a dividend. However, the directors pay themselves fees and have voted for themselves an ‘achievement bonus’. Charlie is concerned that this is a policy of the business and that dividends will never be declared. She is concerned that her stake in the business will continue to go unrecognized and unrewarded.

Advise the parties as to their rights and obligations in this matter.

**Indicative content outline answer:**

# *Purchase of Shares and Payment*

* Shares must not be offered at a discount. Where they are, the allottee is liable to pay the company an amount equal to the amount of the discount and any interest owing (at an appropriate rate).
* The shares that are issued or allotted have to be paid for, however this does not necessarily mean that such payment must be in cash.
* Where non-cash consideration has been accepted for the shares, the contract to this effect must be sent to the Registrar within one month, and the public companies must enclose the valuation report with this contract. Having received the information, the Registrar publishes the notice in the ‘London Gazette.’

## ***Directors’ Pay and Contracts***

* It is not required that a director receives pay (remuneration) for their activities as a director (such as a non-executive director).
* Where payment is provided this is generally done so through a contract between the company and the director, and due to the fiduciary relationship between the director and the company, the director is not permitted to make any profit that has not been expressly identified in the agreement.
* Fees and expenses may be paid, but in relation to executive directors, payment is traditionally made through a contract of service (an employee) and as such, it is a contract that must be personally performed by the post-holder.

# *Directors’ Liability to Shareholders*

* The directors of a company and the company secretary owe duties to the company as a whole rather than to the individual shareholders (who make up the company) and as such the shareholders are unlikely to be able to claim directly against the director based on their conduct.
* There appears to be a potential problem then between the decisions taken by the directors and the amount of influence that can be exerted by the shareholders, and this may be even more marked where the shareholders are in a minority.

# *Minority Protection*

* Shareholders have the right, and the company is obliged in certain circumstances, to place a resolution at a general meeting and have this voted upon by the members (the shareholders).
* Directors may also be shareholders and they may form a majority and hence would find it relatively easy to pass through the resolutions that require a simple majority, or even those requiring a 75% majority (see *Foss v Harbottle*).
* The claim by minority shareholders in *Foss* failed, but there have been many advances since the case was heard, with many exceptions to the rule established that, whilst it remains ‘good law,’ its usefulness has been significantly curtailed.
* The CA 2006 has introduced protections for minority shareholders where a shareholder may initiate proceedings against a director on the company’s behalf, (a derivative claim) in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.
* Note that as claims made through the shareholders are on the company’s behalf, any award will be provided to the company, albeit that the shareholder claimant will be able to recover any expenses incurred in the action.
* In order to use this procedure, the CA 2006 identifies requirements that must be satisfied. The first is that the member must obtain the court’s permission to proceed with their action.
* The first stage is to determine whether a *prima facie* case exists against the director. Where this is satisfied, the case continues and the court may give directions as to the evidence to be provided by the company, and at the hearing the court may give permission of the claim to continue on the terms it sees fit; refuse permission and dismiss the claim; or adjourn proceedings and give any directions it thinks fit. Section 263 identifies situations where permission must be refused, and these occur where the court is satisfied that:
1. that a person acting in accordance with section 172 (duty to promote the success of the company) would not seek to continue the claim; or
2. where the cause of action arises from an act or omission that is yet to occur, that the act or omission has been authorized by the company; or
3. where the cause of action arises from an act or omission that has already occurred, that the act or omission (i) was authorized by the company before it occurred, or (ii) has been ratified by the company since it occurred.
* Another area of protection available to the minority shareholder, rather than a derivative claim, is because their rights have been ‘unfairly prejudiced’ by the way in which the company is being run.

## ***Unfair Prejudice***

* The protection of members against unfair prejudice is contained in Part 30 of the CA 2006 and provides a right for members to petition a court that the company’s affairs are being conducted in a manner that is likely to unfairly prejudice the interests of members generally, or some part of its members (including at least themself).
* The member may also petition on the basis that an actual or proposed act or omission of the company is or would be so prejudicial. This section of the Act also applies to a person who is not a member of the company but to whom shares in it have been transferred as they apply to a member of a company.
* Where the court is satisfied that the petition is well founded, it is empowered:

(a) to order as it thinks fit relief in respect of the matters complained of such as to regulate the conduct of the company’s affairs in the future, such as altering the articles to prevent future abuses.

(b)(i) to require the company to refrain from doing or continuing an act complained of (for example to stop directors’ unusually high salaries that are preventing dividends being provided to the shareholders).

(b)(ii) to do an act that the petitioner has complained it has omitted to do (for example to adhere to resolutions of the board).

(c) to authorize civil proceedings to be brought in the name of (and on behalf of) the company by such person(s) and on such terms as the court may direct (for example to avoid the *Foss* situation and enable a claim in the company’s name, rather than the shareholder).

(e) to provide for the purchase of shares of any members of the company by other members (or by the company itself); and in the case of purchase by the company, the reduction of the company’s share capital accordingly (as demonstrated in *Re London School of Electronics*).

* This section of the CA 2006 restates the law that had already been included in the CA 1985 and incorporates a wide range of activities likely to adversely affect shareholders, particularly minority shareholders.
* The directors may be negligent in their management of the company that may, if the facts support it, lead to unfair prejudice; the directors may pay themselves salaries that reduces or removes entirely the members’ dividends (*Re Sam Weller & Sons Ltd*); shares could be provided to directors on much more favourable terms than available to members and so on. Many of the cases based on the unfair prejudice principle have focused on where a major shareholder has been refused a management role with the company (*Re London School of Electronics*) or removed from the board of directors (*Ebrahimi v Westbourne Galleries*). Where a director (and shareholder) of a company has been removed so they can no longer take an active part in its management, the court has often ruled that the majority shareholders must purchase the shares of the removed director (but not necessarily a director who has not been removed and simply disagrees with the direction of the company - *O’Neill v Phillips*), to allow the affected director to invest their money in another company.

2. Jackson’s Paints Ltd is a company in financial trouble and has experienced the following situations and requires advice on, among other things, the validity of the charges applied to its property and how to proceed.

Jackson’s Paints Ltd decided to attempt to raise funds through the directors’ decision to issue debentures.

A. One loan of £100,000 was made by Chloe, the wife of one of the directors, and this loan was secured through the issuing of a fixed charge over the property where the company sells its product (paint) to the public. The property was valued at £150,000.

B. A further loan of £20,000 was made by the company’s bank by the issuing of a floating charge over the company’s entire stock.

**C.** A final loan of £30,000 was obtained from Dale but the fixed charge issued to him in relation to this loan was over the same property as provided to Chloe.

The company’s articles of association require that all loan agreements are first approved by the board of directors before they can take effect. The fixed charge provided to Chloe was not agreed by the board of directors and it was not registered. The floating charge issued to the bank was agreed by the board and was correctly registered. The fixed charge provided to Dale was correctly registered.

Having obtained the loans, Jackson’s Paints Ltd failed to make repayments as they became due to the bank or to pay its staff their wages. Further evidence has come to light that before any of these loans were agreed, the auditors of the company had advised the directors of Jackson’s Paints Ltd that the company was insolvent and should be wound up. Some of the directors are still of the opinion that the company can trade out of these problems when the economic downturn improves.

Advise:

a. Jackson’s Paints Ltd on the validity of the charges it has purported to create over its property;

b. the directors on the potential personal liability for the debts of the company;

c. the options available to a secured creditor when faced with a company unable to pay its debts, and how such a creditor may petition for a company to be wound up;

d. the directors on granting charges when under notice that the company was insolvent.

**Indicative content outline answer:**

* Specifically, the answer will include a discussion of the development of insolvency laws and the duties of the directors to the company's creditors when the company is insolvent / coming towards insolvency.
* As the question involves fixed and floating charges, these will be identified and discussed from the perspective of their validity when established during the company’s financial trouble / heading towards insolvency.
* The answer will explain the remedies available to the creditors when the company defaults on payments due including the options available to secured and unsecured creditors.
* Winding Up / Liquidation: The student will identify the nature and purpose being to permit the fair division of a company’s assets between primarily its creditors and secondly its members.
* Hence, the following issues / purposes of liquidation will be expected to be considered:
* to provide for equitable and fair distribution of assets of company among its creditors
* to put an end to continued existence of hopelessly insolvent companies
* to allow for investigations of the company’s affairs, in particular the event leading up to the company's failure. This should lead to an interesting discussion of the potential liability for directors (breach of fiduciary duty or wrongful trading s. 213 IA 86 or disqualification under CDDA 86).
* In relation to the creditor wishing for the company to be wound-up, the voluntary / compulsory winding-up measures will be most relevant (although there could be some very brief mention of the public interest method as well).
* Voluntary winding-up: Where a company decides voluntarily to wind up. It is (usually) quicker and cheaper than compulsory wind up. The Official Receiver is not involved.
* Section 84(1) IA 86 establishes 3 situations:
1. When period, if any, for duration of company expires and the general meeting has passed a resolution requiring it to be wound up (rare);
2. Company resolves by special resolution that it be wound up voluntarily (this will result in members' voluntary winding up).
3. Company resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business (this will result in creditors' voluntary winding up).
* A copy of the resolution must be sent to Registrar - 15 days (s. 84(3) IA and CA 2006) and the company shall within 14 days after resolution give notice in Gazette.

***Members' Voluntary Winding Up (ss. 90-96 and ss. 107-116 IA 86)***

* The directors have to swear a Declaration of Solvency - they have examined the company's affairs and are of opinion that the company will be able to pay its creditors in full, plus any interest, within 12 months (maximum) from the commencement of winding up.
* The declaration must have a list of the company's assets and liabilities as up to date as possible.
* The directors must have reasonable grounds for opinion of being able to pay debts; if not the possible jail or fine (or both) (s. 89(4) IA).
* NB. If debts are not paid in full within the specified period, it is presumed that the directors did not have reasonable grounds for holding the opinion i.e. a reversal of burden of proof and a criminal offence. Negligence will be enough to establish liability.
* A Members' Voluntary Winding-Up commences at passing of resolution.
* The company cannot carry on business except as required for beneficial winding up (s. 87(1)). Any transfer of shares (without permission of the Liquidator) or alteration in status of members is VOID (s. 88).
* At the general meeting a liquidator is appointed. The powers of the directors cease - unless the Liquidator allows for their continuance (s. 91(1) & (2)). The role of the Liquidator is set out in s. 107:
* To realise the company's assets and apply the company's property "in satisfaction of the company's liabilities *pari passu* and subject to that application" to distribute its property "among the members according to their rights and interests in the company".
* When the company's affairs are fully wound up the liquidator calls a meeting and lays the accounts of winding up (s. 106). BUT if the Liquidator is of the opinion that the company will not be able to pay its debts in full he/she can change a Members' Voluntary liquidation into a Creditors' Voluntary Liquidation (s. 95).

***Creditors' Voluntary Winding Up (Most commercially effective and most common).***

* If the directors cannot make a Declaration of Solvency then it is a Creditors' Voluntary Winding Up.
* Section 84(1) IA 86: Company passes an extraordinary resolution to the effect that company "cannot by reason of its liabilities continue its business and that it is advisable to wind up".
* Under s. 98(1): the company must call meeting of creditors within 14 days of resolution. Also: notice of meeting must be sent by post to creditors not less than 7 days before day of meeting PLUS Gazette and 2 newspapers circulating in locality.
* At the meeting the directors must lay a "statement of affairs" - assets, debts, liabilities, and names / addresses of the creditors.
* Section 100: The meeting decides on the appointment of the Liquidator. The wishes of the creditors will prevail. Section 103: on appointment of the Liquidator and all powers of the directors cease.
* To encourage creditor participation (as recommended by Cork Report) the creditors may appoint a liquidation committee to liaise with the Liquidator on behalf of them all. It makes communication much easier - avoids the need to call formal meetings (these may have 3 - 5 members). The primary function of Liquidation Committee is to monitor the activities of the Liquidator in the conduct of the winding up. The Liquidator is under a duty to keep Liquidation Committee informed.
* Section 106(6): When the company is fully wound up the Liquidator calls a meeting of creditors and lays the final accounts before meeting.

***Compulsory Winding Up***

* Section 122 IA 86 specifies as follows:

“A company may be wound up by the court if-

……..

1. the company is unable to pay its debts
* Inability of the company to pay its debts (s. 122(1)(f) IA 86). A company is unable to pay its debts if;
* it cannot pay a debt of over £750 within a period of 21 days of a request for payment (s. 123(1)(a) IA 86)
* failure to make payment after a court judgment (s. 123(1) (b)(c) and (d)).
* inability to pay debts as they fall due (s. 123(1)(e)). This is not common.
* Under the IA 86 s. 124 those entitled to petition to have the company wound up are:
* The company
* The directors
* Creditor(s)
* A contributory
* The Secretary of State
* The Official Receiver
* The procedure for winding-up a company by the court is as follows:
1. Application by petition to court
2. Intimation to all interested parties
3. Grant of petition by court and appointment of liquidator
4. Advertisement of liquidation and invitation to creditors to send in claims and attend meetings.
5. Preparation of the company’s state of affairs
6. Establishment of a liquidation committee
7. Getting in the company’s property
8. Payment of claims to creditors and return of capital, if any, to members
9. Final meeting and dissolution of company
* Powers of the Liquidator: The liquidator has a large number of powers to enable him/her to carry out his/her task. The liquidator has various methods of maximising the assets and minimising the liabilities:
* disclaiming onerous contracts (ss. 178-182 IA 86)
* calling on contributories to pay outstanding sums to the company (Sch.3 IA 86)
* avoidance of antecedent transactions being transactions at an undervalue (s. 238IA 86) and preferences (s. 239 IA 86) within certain time limits depending on whether or not the recipient is a connected person (two years for both transactions at an undervalue and preferences) or anyone else (two years for a transaction at an undervalue and six months for a preference).
* avoidance of certain floating charges under s. 245 IA 86, if granted in favour of a connected person within the last two years, or to an unconnected person in the last 12 months at a time when the company was already unable pay its debts.
* contributions from directors as assessed by a court as a result of director’s misfeasance (s. 212 IA 86), fraudulent trading (s. 213 IA 86) or wrongful trading (s. 314 IA 86).
* Out of the funds available to the liquidator, she must pay the preferential debts (s. 175 IA 86). The order of distribution is as follows:
* Fixed charge holders;
* Fees of the liquidator;
* Preferential debts;
* Floating charge holders;
* Unsecured debts (*pari passu*);
* Return of capital to members in accordance with the Articles.
* When all sums have been paid out and the final account is ready, a last meeting is held and the Registrar is asked to dissolve the company.
* Specific points in relation to the question is for the bank (creditor) to serve a written demand for payment at the company’s registered office. If three weeks pass with a failure to receive payment or the debt being secured to the creditor’s satisfaction, the company is deemed to be unable to pay (and the minimum owed is in excess of £750).
* A more speedy remedy is to follow s. 123(1)(e) – and petition the court, claiming the debt and this has not been disputed, and being unable to repay should be wound up (*Taylor’s Industrial Flooring Ltd v H Plant Hire (Manchester) Ltd* [1990]).
* The nature of the charges and the consequences for lack of registration and their validity thereafter (s. 869). The issue of registering a charge twice for the same asset should be discussed.
* The nature of floating charges and the crystallization also needs to be considered – in which circumstances crystallization takes effect (e.g. where the chargeholder appoints a receiver / an administrator is appointed).
* The failure to register a charge within 21 days results in the charge being void *ab initio* until registered under an order made through s. 873 (and then becomes valid from the date of registration). But it is important to discuss the issue of late application and refusal by the court for registration where the application follows the passing of a resolution for voluntary winding-up / after an order for compulsory liquidation / company is in administration and it is evident that it will proceed to insolvent liquidation (*Re Barrow Borough Transport Ltd* [1990]).
* The actions of the directors in providing charges where they have been advised that the company does not have the means to satisfy the debt should be noted as a potential breach of their duties (*Winkworth v Edward Baron Development Co. Ltd* [1987]).
* You should consider the identifiable breach of duty to the creditors and the potential misfeasance proceedings under s. 212 IA 86, and their conduct and possible contribution to the company’s assets. The proof of intent required to establish that the directors acted to defraud the creditors / for a fraudulent purpose is the criminal test (beyond reasonable doubt).
* The issue of wrongful trading under s. 214 may be an easier / more successful action – and the subsequent action under the CDDA 1986 automatic disqualification of the directors for a maximum of 15 years (and with the actions of the directors of Jackson’s Paint Ltd this behaviour would likely make them unfit and be disqualified for a minimum of 2 years (s. 6)).
* It may be appropriate to consider ‘top-slicing’ due to the money owing to the employees for their wages.
* The issue relating to the failure of the directors to obtain
board approval for the loans should be raised.