



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 3B**

**THE INSOLVENCY SYSTEM OF THE UNITED KINGDOM  
(ENGLAND AND WALES)**

This is the **summative (formal) assessment** for **Module 3B** of this course and is compulsory for all candidates who **selected this module as one of their compulsory modules from Module 3**. Please read instruction 6.1 on the next page very carefully.

If you selected this module as **one of your elective modules**, please read instruction 6.2 on the next page very carefully.

**The mark awarded for this assessment will determine your final mark for Module 3B.** In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

## **INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT**

**Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.**

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment3B]**. An example would be something along the following lines: 20222-514.assessment3B. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6.1 If you selected Module 3B as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2022**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2022. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
- 6.2 If you selected Module 3B as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2022** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. If you elect to submit by 1 March 2022, you **may not** submit the assessment again by 31 July 2022 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **7 pages**.

**ANSWER ALL THE QUESTIONS**

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

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

**Question 1.1**

Please select the **most correct ending** to the following statement:

The Administration (Restrictions on Disposal etc to Connected Persons) Regulations 2021 restrict pre-pack sales which constitute a substantial disposal of the company's property to connected parties where the disposal occurs:

- (a) within 10 weeks of the commencement of the administration.
- (b) within 8 weeks of the commencement of the administration.**
- (c) within 4 weeks of the commencement of the administration.
- (d) on the day the company enters administration.

**Question 1.2**

What is the **maximum length** of a Moratorium under Part 1A of the Insolvency Act 1986 to which creditors can consent without any application to the court?

- (a) 40 business days.
- (b) One year and 20 business days.
- (c) One year and 40 business days.
- (d) One year.**

**Question 1.3**

Which of the following **is not** a requirement for a company that wishes to enter into a Restructuring Plan under Part 26A of the Companies Act 2006?

- (a) The company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern.
- (b) A compromise or arrangement is proposed between the company and its creditors, or any class of them, or its members, or any class of them.

Commented [JL1]: 46 out of 50  
Well done!

Commented [JL2]: 8 out of 10

(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) £500
- (b) £750
- (c) £1,000
- (d) £2,000

#### Question 1.7

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

- (a) Wrongful trading.
- (b) Breach of fiduciary duty.

Commented [JL3]: b

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

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

#### Question 1.8

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

(a) 6

(b) 8

(c) 10

(d) 12

Commented [JL4]: c

#### Question 1.9

Which of the following statements is **incorrect**?

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

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

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

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

#### Question 1.10

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

(a) 6 months.

(b) 12 months.

(c) 2 years.

(d) 5 years.

**QUESTION 2 (direct questions) [10 marks]**

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**Question 2.1 [maximum 5 marks]**

Who may bring an action under: (i) section 423 of the Insolvency Act 1986; (ii) section 6 of the Company Directors Disqualification Act 1986; and (iii) section 246ZB of the Insolvency Act 1986?

Under Section 423 of the Insolvency Act 1986 which refers to transactions defrauding creditors, the official receiver, liquidator, administrator or any victim of the transaction (with leave of court) can bring an action where the company is being wound up or in administration. Where the victim is bound by a Corporate Voluntary Arrangement ("CVA"), the supervisor of the CVA or any victim of the transaction (whether bound or not) can bring an action. In any other case, the victim of the transaction can bring an action under section 423. In all instances, an application made is treated as though made on behalf of every victim of the transaction.

Section 6 of the Company Directors Disqualification Act 1986 ("CDDA") refers to the duty of court to disqualify unfit directors. Section 7 of the CDDA elaborates on the application to court for a disqualification order. Section 7 states "if it appears to the Secretary of State that it is expedient in the public interest that a disqualification order under section 6 should be made against any person, an application for the making of such an order against that person may be made by the Secretary of State or if the Secretary of State so directs in the case of a person who is or has been a director of a company which is being or has been wound up by the court in England and Wales, by the official receiver."

Section 246ZB of the Insolvency Act 1986 refers to wrongful trading in administration to make directors of insolvent companies liable for wrongful trading. Section 246ZB states "the court, on application of the administrator, may declare that that person is to be liable to make such contribution (if any) to the company's assets as the court thinks proper." In reading, the administrator in an administration can bring an action under section 246ZB.

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**Question 2.2 [maximum 5 marks]**

List the **five (5)** qualifying decision procedures by which creditors may make decisions in the context of an insolvent company.

Section 246ZE(1) of the Insolvency Act 1986 provides that where "a person seeks a decision about any matter from a company's creditors or contributories, the decision may be made by any qualifying decision procedure that person thinks fit, except that it may not be made by a creditors' meeting or (as the case may be) a contributories' meeting" unless requested by the requisite majority of creditors or contributories.

Rule 15.3 of The Insolvency (England and Wales) Rules 2016 provides the following as decision procedures:

- a. Correspondence;
- b. Electronic voting;
- c. Virtual meeting;
- d. Physical meeting; or
- e. Any other decision-making procedure which enables all creditors who are entitled to participate in the making of the decision to participate equally.

Commented [JL7]: 5

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

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**Question 3.1 [maximum 6 marks]**

Can an administrator who wishes to continue to operate the business of the company in administration require suppliers of goods and services to continue to supply those goods and services during the administration?

An administration is a temporary procedure with one or more of the three statutory objectives set out in paragraph 3 of schedule B1 of the Insolvency Act 1986 ("the Act") that is rescuing the company as a going concern, achieving a better result for the company's creditors as a whole than would be likely if the company were wound up or realising property in order to make a distribution to one or more secured or preferential creditors.

In order to rescue the company or maximize the value of its business for sale as a going concern, the administrator may decide to continue to operate the business of the company. In order to do so, the administrator may require essential supplies. If a request is made by the administrator after the commencement of the administration, for the giving of any of the supplies including water, electricity, gas, telecommunication and goods and services, section 233 of the Act provides that 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, but shall not 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."

Goods and services refer to the supplies for the purpose of enabling or facilitating anything to be done by electronic means such as point of sale terminals, computer hardware and software, information, advice and technical assistance in connection with the use of information technology, data storage and processing and website hosting as provided in section 233(3A).

Section 233B further protects the supply of goods and services when a company becomes subject to a relevant insolvency procedure, one of which is administration. If a contract for the supply of goods and services has a provision that the contract or the supply would terminate, or any other thing would take place, because the company becomes subject to the relevant insolvency procedure, or the supplier would be entitled to terminate the contract or the supply, or to do any other thing, because the company becomes subject to the relevant insolvency procedure, such a provision ceases to have an effect when the company enters administration in accordance with section 233B. Furthermore, where a supplier is entitled to terminate the contract due to an event occurring before the administration, this entitlement may not be exercised after the commencement of the administration.

Section 233 and section 233B work in tandem to protect the administrator and allow him to continue to operate the business of the company in an administration without interruptions in essential supplies.

**Commented [JL9]:** 5  
233B extended to all supplies

**Question 3.2 [maximum 9 marks]**

Explain the order of priority of payments in a liquidation and explain the nature of the rights enjoyed by each class of creditor or expense.

The main objective of a liquidation is to wind up a company by realizing its assets for distribution to its creditors and/or shareholders subject to the statutory order of distribution. The Insolvency Act 1986 ("the Act") and the Insolvency (England and Wales) Rules 2016 ("the Rules") sets out the order of priority of payments in a liquidation.

### **Fixed charge holder**

If the debtor has a secured creditor with a fixed charge over any property, proceeds from the sale of the charged property will go to the secured creditor to discharge its liabilities with the secured creditor before any other payments.

### **Expenses of winding up**

Section 115 of the Act provides that all "expenses properly incurred in the winding up, including the remuneration of the liquidator, are payable out of the company's assets in priority to all other claims." Chapter 6.42 of Part 6 of the Rules further sets out the priority of payment of costs and expenses as follows:

- a. expenses which are properly chargeable or incurred by the liquidator in preserving, realising or getting in any of the assets of the company or otherwise;
- b. the cost of any security provided by the liquidator or special manager under the Act or the Rules;
- c. the remuneration of the special manager (if any);
- d. any amount payable to a person employed or authorised, to assist in the preparation of a statement of affairs or of accounts;
- e. the costs of employing a shorthand writer on the application of the liquidator;
- f. any necessary disbursements by the liquidator in the course of the administration of the winding up (including any expenses incurred by members of the liquidation committee or their representatives);
- g. the remuneration or emoluments of any person who has been employed by the liquidator to perform any services for the company;
- h. the remuneration of the liquidator;
- i. the amount of any corporation tax on chargeable gains accruing on the realisation of any asset of the company; and
- j. any other expenses properly chargeable by the liquidator in carrying out the liquidator's functions in the winding up.

### **Preferential creditors**

Following the costs and expenses of the liquidation are preferential creditors as provided by section 175 of the Act such that "in a winding up the company's preferential debts shall be paid in priority to all other debts after the payment of (a) moratorium debts, and (b) expenses of the winding up." Section 175(2) further states that preferential debts have priority over the claims of holders of debentures secured by, or holders of, any floating charge created by the company where the assets of the company available for payment of general creditors are insufficient to meet them.

Under the Act, there are two classes of preferential debts, ordinary and secondary. Section 175 states that ordinary preferential debts are paid before secondary preferential debts. Both are rank equally amongst themselves and shall be paid in full, unless the assets are insufficient to meet them, in which case they abate in equal proportions.

With reference to section 386 and schedule 6 of the Act, the following are ordinary preferential debts:

- a. Any sum for contributions to occupational pension schemes and state scheme premiums;
- b. Any amount (a) which is owed by the debtor to a person who is or has been an employee of the debtor, and (b) is payable by way of remuneration in respect of the whole or any part of the period of 4 months next before the relevant date;



- c. Any amount owed by way of accrued holiday remuneration, in respect of any period of employment before the relevant date, to a person whose employment by the debtor has been terminated, whether before, on or after that date;
- d. So much of any sum owed in respect of money advanced for the purpose of wages or holiday remuneration;
- e. Any amount which (a) is ordered to be paid under the Reserve Forces (Safeguard of Employment) Act 1985, and (b) is so ordered in respect of a default made by the debtor before that date in the discharge of his obligations under that Act;
- f. Any sums due in respect of (a) the levies on the production of coal and steel referred to in Articles 49 and 50 of the European Coal and Steel Community Treaty, or (b) any surcharge for delay provided for in Article 50(3) of that Treaty and Article 6 of Decision 3/52 of the High Authority of the Coal and Steel Community;
- g. Any debt owed to the scheme manager of the Financial Services Compensation Scheme under section 215(2A) of the Financial Services and Markets Act 2000; and
- h. So much of any amount owed at the relevant date in respect of an eligible deposit as does not exceed the compensation that would be payable in respect of the deposit under the Financial Services Compensation Scheme to the person or persons to whom the amount is owed.

Section 386 and schedule 6 of the Act provide the following as secondary preferential debts:

- a. So much of any amount owed at the relevant date by the debtor to one or more eligible persons in respect of an eligible deposit as exceeds any compensation that would be payable in respect of the deposit under the Financial Services Compensation Scheme to that person or those persons;
- b. Any amount owed at the relevant date by the debtor to one or more eligible persons in respect of a deposit that (a) was made through a non-UK branch of a credit institution authorised by the competent authority of the United Kingdom, and (b) would have been an eligible deposit if it had been made through a UK branch of that credit institution; and
- c. Any amount owed at the relevant date by the debtor to the Commissioners in respect of value added tax, or a relevant deduction.

#### **Floating charge holder**

Once all preferential creditors of the debtor have been paid, the next creditor to be paid will be floating charge holders. In the case of multiple floating charge holders, priority will be given according to which charge was created first. However, the liquidator must take note of section 176A of the Act for floating charges created after 15 September 2003, which sets out share of assets for unsecured creditors when a floating charge relates to a property of the debtor.

Section 176A provides that a liquidator "shall make a prescribed part of the company's net property available for the satisfaction of unsecured debts, and shall 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."

The Insolvency Act 1986 (Prescribed Part) Order 2003 and its amendment The Insolvency Act 1986 (Prescribed Part) (Amendment) Order 2020 provides a guide to the liquidator for calculating the prescribed part. Where the company's net property does not exceed £10,000 in value, 50% of that property shall be the prescribed part and where the company's net property exceeds £10,000 in value, the prescribed part shall be the sum of 50% of the first £10,000 in value; and 20% of any excess in value of £10,000 subject to a maximum prescribed part of £800,000.

#### **Unsecured creditors**

Unsecured creditors such as creditors with no security, trade creditors, suppliers, customers, contractors, unsecured loans from banks and lenders, unsecured overdrafts, directors' loan, etc. are paid out after floating charge holders. Unsecured creditors are ranked equally amongst themselves.

### Shareholders

Once the liquidator is satisfied that all creditors have been fully settled, shareholders are entitled to distribution from any surplus funds from the realization of assets. Distribution to shareholders are made pro rata to their respective shareholdings.

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

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Prior to going into compulsory liquidation on 23<sup>rd</sup> December 2021, under pressure from its bank, Stercus Bank plc, and in order to prevent it from demanding repayment of the company's loans, Corfee Zero Limited ("the Company"), granted a debenture in favour of Stercus Bank plc in February 2021. The debenture contained a floating charge over the whole of the Company's undertaking.

The winding up order followed a creditor's winding up petition issued on 14<sup>th</sup> October 2021.

In July 2021, as the Company continued to suffer cash flow problems, the directors approved the sale of 5 coffee roasting machines to Ann Young (a director) for £10,000 in cash. The machines had been bought for £25,000 a year before.

A month before the winding up order was made, Ann Young received an email from Beans and Leaves Ltd, one of the Company's key suppliers. The supplier demanded immediate payment of all sums owing to it and informed the Company that further supplies would only be made on a cash on delivery basis. As the continued supply of coffee beans was seen as essential by the Company, the board authorised a payment of £8,000 to cover existing liabilities and agreed to further payments, on a cash on delivery basis, for further supplies which amounted to further payment of £3,000 up to the date of the winding up order.

The liquidator has asked for advice whether any action may be taken in respect of the floating charge in favour of Stercus Bank plc and the two subsequent transactions.

### **Using the facts above, answer the questions that follow.**

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

#### **Question 4.1 [maximum 5 marks]**

The floating charge in favour of Stercus Bank plc;

Section 245 of the Insolvency Act 1986 ("the Act") provides for the avoidance of certain floating charges to prevent unsecured creditors from obtaining security of a floating charge just before a company enters a formal insolvency procedure that is being entitled to distribution before unsecured creditors. This section provides that a floating charge is rendered invalid when the company is in liquidation or administration if the floating charge was created 12 months before the onset of insolvency (for parties not connected to the company) unless the charge was created for "new" consideration. Under section 245, a

floating charge will not be invalid if the “new” consideration for the creation of the charge consists of money paid, or goods or services supplied, to the company at the same time (or after) the creation of the charge OR the “new” consideration consists of the discharge or reduction of any debts of the company at the same time (of after) the creation of the charge.

With respect to the debenture issued by the Company in favour of Stercus Bank plc, the floating charge was created 9 months before the commencement of the liquidation and no “new” consideration was received for the creation of the charge. Under pressure from the bank, the charge was instead created to prevent the bank from demanding repayment of the Company’s loan.

Based on the facts provided, the floating charge in favour of the bank may be caught under section 245 and be rendered invalid although the underlying debt upon which the floating charge was created for remains valid. This would make Stercus Bank plc an unsecured creditor of the [Company](#).

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#### Question 4.2 [maximum 6 marks]

The sale of the coffee roasting machines; and

Section 238 of the Insolvency Act 1986 (“the Act”) provides the liquidator with an avenue to attack transactions at an undervalue. As defined under section 238, a company enters into a transaction at an undervalue if the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration or the company enters into a transaction with that person for a consideration the value of which, in money or money’s worth, is significantly less than the value, in money or money’s worth, of the consideration provided by the company within two years from the onset of insolvency.

With respect to the sale of the coffee roasting machines to Ann Young, who is a director of the Company, the machines were sold for cash at £10,000 in July 2021 when they had been bought for £25,000 a year before. Based on the facts provided, the transaction appears to be at an undervalue as the machines were sold at a much lower price than they were purchased.

The liquidator should investigate the transaction and if necessary, to have a valuation performed to determine the worth of the machines. If the liquidator is of the opinion the transaction was indeed entered into at an undervalue, the liquidator may apply to the court for an order under section 238 and if the court thinks fit, to make an order for restoring the position to what it would have been if the company had not entered into that transaction.

However, Ann Young may defend the transaction as being one entered into in good faith and for the purpose of carrying on its business and that there were reasonable grounds for believing the transaction would benefit the company, as the Company was experiencing cash flow problems at the time. If the court is satisfied with the defence, the court shall not make an order under section [238](#).

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Effect of the connected party sale?

#### Question 4.3 [maximum 4 marks]

The payments to Beans and Leaves Ltd.

One of the main principles of a liquidation is the principle of pari passu distribution that is all creditors of a certain class are treated equally during a distribution. However, there are certain instances where a creditor is placed in a better position than other creditors in the same class. Section 239 of the Act provides liquidators with the avenue to avoid a transaction as a preference upon application to the court. There are several preconditions for a liquidator to succeed in his application to void such a transaction:

- a. That the person given preference is one of the company's creditors or a surety or guarantor for any of the company's debts or other liabilities;
- b. That the company does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done;
- c. That the company which gave the preference was influenced in deciding to give it by a desire to produce in relation to that person;
- d. That the preference was given at a relevant time.

With respect to the payment to Beans and Leaves Ltd ("B&L"), the payment for their liabilities was made after the date of the commencement of the winding up placing Beans and Leaves Ltd in a better position than other unsecured creditors. The transaction so far appears to be a preferred transaction save for the "desire to prefer" which the liquidator must prove as B&L is not connected to the Company and there is no presumption that preference is given under Section 239(6).

In the case *Re MC Bacon Ltd.*, it was found that there was no desire to prefer as the preference was given not to place the creditor in a better position but to aid in the continuation of trading by the company and this decision has been upheld in subsequent decisions. Taking this into considerations, the payment to B&L appears to be motivated by the desire to continue trading as the supply of coffee beans was considered an essential supply to the Company.

While the liquidator can make an application to court under his statutory powers of Section 239 to void the payment to B&L under the basis that a preference is given, it may be difficult for him to prove that there was a desire to prefer B&L.

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Refer to p 64 in the Guidance Text.  
This scenario deals with a disposition after the commencement of the company's insolvency proceeding.  
Therefore, s 127 and not s 239 applies.

**\* End of Assessment \***