INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

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]: 43/50 = 86% a very good effort indeed. Well Done!

Commented [WPA2]: 8/10

Commented [WPA3]: D is correct

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.

Commented [WPA4]: C is correct

(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.
Yes - under section 10.

(b) Breach of fiduciary duty.
To be taken into account per CDDA, Schedule 1, para 5, but not a separate ground per se.

(c) Being found guilty of an indictable offence in Great Britain.
(No - must be 'in connection with the promotion, formation, management, liquidation or striking off of a company, or with the receivership or management of a company's property.' But this is the same as (d)***, and I can only choose one answer.)***

(d) Being found guilty of an indictable offence overseas.
(No - must be 'in connection with the promotion, formation, management, liquidation or striking off of a company, or with the receivership or management of a company's property.' But this is the same as (c)***, and I can only choose one answer.)***

Question 1.8

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

(a) 6

(b) 8

(c) 10

(d) 12

Question 1.9

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

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

Course text, p76: "inward-bound" EU officeholders, in relation to proceedings commenced after Brexit, are no longer automatically ***recognised by the UK courts although recognition is relatively straightforward under the terms of the CBIR."***

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

Correct.

(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.

Correct.

(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.

Incorrect, because Ireland is designated under The Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986 (SI 1986 No. 2123) for the purposes of s426(11), and Ireland is an EU Member State. But the question only allows me to select a single answer, so (a) seems more incorrect. Sorry to be pedantic, but this question confused me!

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 - your comment on the official receiver's powers to bring an action are not quite complete but do not warrant losing a mark.

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 of the Insolvency Act 1986 (the Act) provides certain parties with the authority to challenge transactions that are intended to defraud creditors. These parties include: (i) the official receiver, the liquidator, the administrator, and any creditor victim (with court permission) in cases where the company is in administration or being wound up; (ii) the CVA supervisor or any victim of the transaction (whether bound by the CVA or not) in cases where a victim is obligated by a CVA; or (iii) any victim of the transaction in any other instance.

In cases where section 6 or of the CDDA is satisfied, section 7(1) confers the power to bring an application on the Secretary of State or, in relation to a winding-up in England and Wales, the Official Receiver.

Section 246ZB confers powers on the administrator: if while a company is in administration it appears that subsection (2) applies in relation to a person who is or has been a director of the company, the court, on the 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.

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.***

Insolvency Act 1986, Part A1, Chapter 4, Section A18(3):
(1) the monitor's remuneration or expenses,
(2) goods or services supplied during the moratorium,
(3) rent in respect of a period during the moratorium,
(4) wages or salary arising under a contract of employment,
(5) redundancy payments.
(also, debts or other liabilities arising under a contract or other instrument involving financial services.)
https://www.legislation.gov.uk/ukpga/1986/45/section/A18/2020-06-26

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

Commented [WPA8]: 14/15

Question 3.1 [maximum 6 marks]

Commented [WPA9]: 6/6 vg

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

It depends on the nature of the goods and services,

Executory contracts of a company are not automatically terminated when an administrator is appointed. Historically, contracts of supply which allow for automatic termination have been effective, but statutory exceptions have increasingly made such clauses void.

It is often necessary for an administrator to acquire or maintain certain critical supplies. Section 233 of the Act applies to gas, electricity, water, and communication services, which include point of sale terminals, computer hardware and software, information, advice, technical assistance, data storage, processing, and website hosting. Suppliers are not allowed to demand payment of outstanding debts to provide new or continued supply to a company in administration. However, suppliers can stipulate that the administrator must personally guarantee payment of charges for the supply under Section 233 of the Act.

Additionally, Section 233A of the Act prohibits a supplier of such services from relying on an "insolvency-related term" in a supply contract that would allow the supplier to terminate, alter the terms, or demand higher payments for continued supply, i.e. so-called 'ipso facto' clauses. By adding Section 233B to the Act, the Corporate Insolvency and Governance Act 2020 (the 2020 Act***) extended these protections, prohibiting clauses that permit suppliers to terminate or "do any other thing" concerning the contract if the company enters a formal insolvency procedure.***

If a contract includes such a clause, it is ineffective when the company enters an insolvency procedure under Section 233B. As a result, suppliers cannot terminate supply upon the company's insolvency, demand pre-insolvency arrears to continue supply, or make changes such as increasing prices. Under Section 233B, suppliers cannot insist on a personal guarantee from the administrator, as they can under Section 233. However, a supplier may still terminate a contract with the company with consent from the insolvency office holder or the company, or with the court's permission if the continuation of the contract would cause the supplier hardship.

Sections 233, 233A, and 233B of the Act apply during administration, company voluntary arrangements, and restructuring plans. Furthermore, Section 233B also applies when a company enters a moratorium or a restructuring plan.

Additionally, Section 233B expands the restriction on termination to all other suppliers, except for a limited number of exceptions such as insurers, banks, electronic money institutions, recognized investment exchanges and clearing houses, securitization companies, and overseas companies with corresponding functions.

Question 3.2 [maximum 9 marks]

Commented [WPA10]: 8/9 a very good answer. Perhaps some detail on the operation of the prescribed part might have made it even better.

Explain the order of priority of payments in a liquidation and explain the nature of the rights enjoyed by each class of creditor or expense. *How would this priority change if the company had been subject to a Moratorium under Part A1 of the Insolvency Act 1986 during the 12-week period prior to the commencement of the liquidation?*

In a liquidation, the order of priority of payments is as follows:

1. *Fixed charge holders. A fixed charge is typically taken over a specific, valuable asset (such as land, machinery, ships or aircraft). Title and possession remain with the borrower, but the borrower usually cannot dispose of the asset without the lender's permission or until the debt is repaid. The lender usually has a power of sale over the asset, or the power to appoint a fixed charge receiver to deal with and realise the asset on its behalf (because of concerns over lender liability, the second option is normally used). The lender therefore has a claim over the proceeds of sale in priority to other creditors.*
2. *Expenses of the liquidation: These include the costs of the liquidator, any legal fees, and any other expenses incurred in the liquidation. (Section 115 of the Act, and rules 6.42 and 7.108 of the Rules). These include expenses incurred getting in the company's assets, payments made to people in, e.g. preparing accounts, (d) any necessary disbursements, and salaries of the liquidator's employees.*
3. *Preferential creditors: These include certain debts owed to employees, such as wages, holiday pay, and pension contributions, as well as certain taxes owed to HMRC. This is under sections 386, 387 and Schedule 6: section 175. There are ordinary and secondary preferential debts. The former are paid before the latter. For financial institutions, they include debts owed to the Financial Services Compensation Scheme (FSCS) and eligible deposits where an amount is FSCS-protected. Secondary preferential debts for financial institutions include deposits that are not eligible for FSCS protection. Ordinary and secondary preferential debts, within their respective classes, rank pari passu i.e. reduce pro rata if the company's assets are insufficient to pay them all. UK HM Revenue and Customs (HMRC) is a secondary preferential creditor in insolvency procedures that commenced on or after 1 December 2020. This preferential status only applies to specified taxes that are collected by a company on HMRC's behalf, such as VAT, pay as you earn (PAYE) and employee National Insurance Contributions (NICs). This status means that, in respect of those specified tax debts only, HMRC ranks behind ordinary preferential creditors but ahead of Prescribed Part creditors (see next).*
4. *Floating charge holders: They have a claim over the remaining assets of the company after the fixed charge holders have been paid, but before the unsecured creditors. This is however subject to the operation of the "Prescribed Part" of the company's property which the liquidator must make available for the satisfaction of unsecured debts. This is governed by Section 176A, and applies if a floating charge was created on or after 15 Sep 03.*

5. ***Unsecured creditors: These are creditors who do not have a fixed or floating charge over any of the company's assets. They will receive a pro-rata share of any remaining funds after the expenses and preferential creditors have been paid.***
6. ***Interest incurred on all unsecured debts post-liquidation.***
7. ***Shareholders. Payments to shareholders are however rare, because if the company is insolvent then usually it cannot pay even its creditors. A rare example though is Lehman Brothers, which was cash flow but not balance sheet insolvent. Consequently, a decade after it went into administration, the BBC reported in 2018 that 'Investors who took a gamble on the wreck of Lehman Brothers' UK operations after the investment bank collapsed made up to seven times their money [...] Tony Lomas, the partner at the accountancy firm PwC who was appointed lead administrator, told the BBC there was a surplus of about £8bn..'[1] (I worked on the Lehman Brothers case as a trainee back in 2018, which is why I remember!)***

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?

If the company had been subject to a Moratorium under Part A1 of the Act during the 12-week period prior to the commencement of the liquidation, then certain debts that are not normally included in the order of priority of payments in a liquidation may have priority over unsecured creditors.

This is because Section 174A provides that specific unpaid debts, which are not part of the payment holiday, are given priority over even the liquidator's expenses and fees in a subsequent liquidation. This provision gives a certain form of "super priority" to some unsecured debts in a subsequent liquidation. Similarly, pre-Moratorium bank debt, which falls under the definition of "financial services" and is unsecured or secured, will also acquire such "super priority."

The list comprises:

1. ***Moratorium debts. Debts that fall due during or after the moratorium by reason of an obligation incurred during the moratorium must be paid in full before other debts.***
2. ***Priority pre-moratorium debts. Pre-moratorium debts for which a company does not have a payment holiday during the moratorium will have to be paid in full before any other debts. Debts under financial services contracts only constitute priority pre-moratorium debts to the extent that they fell due as scheduled before or during the moratorium, rather than falling due by way of acceleration or under an early termination clause.***

[1] https://www.bbc.com/news/business-45488397

3. ***Post-moratorium debts. Any debts that the company incurred after the Moratorium period but before the commencement of the liquidation will have the same priority as preferential creditors.***

Finally, it should be noted that (i) there is an exception where accelerated debt, which is any pre-moratorium financial services debt that fell due because of the operation of, or exercise of rights under, an acceleration or early termination provision in the financial services contract, will not acquire such "super priority."; and (ii) the priority of payments for fixed charge holders, expenses of the liquidation, and floating charge holders remains the same and is not affected by the Moratorium.

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

Commented [WPA11]: 11/15

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

The winding up order followed a creditor's winding up petition issued on 14th October 2022.

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

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

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

Using the facts above, answer the questions that follow.

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

Question 4.1 [maximum 5 marks]

Commented [WPA12]: 5/5 a vg answer - s 239 would not be arguable on the facts due to the timing of the execution of the charge.

The floating charge in favour of Fretus Bank plc;

Summary. ***The floating charge granted in favour of Fretus Bank plc in February 2022 may be challenged as a voidable transaction under Section 245 of the Act. The liquidator may investigate whether the charge was granted at a time when the Company was insolvent or where the Company intended to defraud its creditors. If the liquidator finds evidence of such misconduct, they may apply to court to have the charge set aside.***

Relevant Issues:

Whether the floating charge granted in favour of Fretus Bank plc in February 2022 is valid.

Relevant Statutory Provisions:

Insolvency Act 1986, Section 245 - Avoidance of certain floating charges.

Invalid floating charges

A floating charge created before the onset of a company's insolvency will be invalid under section 245 if:

- ***The floating charge was given by the company in exchange only for prior consideration, for example, to secure loans previously made, or the cost of goods or services previously provided. According the question, Fretus Bank (***Fretus***) was granted the floating charge "to prevent it from demanding repayment of the company's loans" – i.e. for prior consideration.***
- ***It was made at within one year before the onset of the company's insolvency. This extends to two years where the floating charge is created in favour of a connected person. On these facts, (i) Fretus is not a connected party; and (ii) in any event, the floating charge was granted 10 months earlier, and so is captured.***
- ***At the time the floating charge was created, the company was unable to pay its debts or became unable to pay its debts as a consequence of the charge (unless the charge was created in favour of a connected person, in which case, the company's ability, or inability, to pay its debts is irrelevant). The question notes that the floating charge was granted "under pressure" from Fretus, which implies that the company may have been unable to pay its debts at the time it was granted.***

Whether the liquidator may take any action

Section 245 of the Act is designed to prevent a company benefiting a creditor by giving a floating charge for existing liabilities for no new consideration. It applies where a company is in administration or in liquidation (section 245(1)). It is particularly useful in attacking a floating charge granted by the company to secure a loan to the company that was previously unsecured. There is some overlap between this power and the power in section 239 of the Act in relation to preference, and a claim under section 239 may also be brought in the alternative, simply as a 'belt and braces' approach.

If the application is successful, the floating charge will be invalid (and deemed always to have been so). The debt has apparently not been repaid, so it would remain outstanding as an unsecured debt. It is possible that the Fretus loan agreement provided that if any security is found to be invalid the loan becomes immediately repayable. Accordingly, although the operation of section 245 alone does not make the debt repayable, the loan agreement may do so. This is probably however an academic point, as company is in liquidation. To the extent however that any payments on the floating charge had already been made, an issue then arising would potentially be whether those repayment could be challenged as (for example) a preference. Rather than the cost of bringing a separate action following a successful s245 claim, the liquidator would be well-advised to consider negotiating an agreement with Fretus in the short period between receipt of the draft judgment from the court, and the consequentials hearing. This way, the agreement could be included in the consequentials order, at minimal additional cost to the parties.

Question 4.2 [maximum 6 marks]

Commented [WPA13]: 6/6 vg

The sale of the marble cutting machines; *and*

Summary. *The sale of the marble cutting machines to Rita Perkins for GBP 10,000 in July 2022 may also be a voidable transaction under Section 239 of the Act if it can be shown that the Company received significantly less than the market value of the machines. If the liquidator finds that this is the case, they may apply to court to have the transaction set aside.*

Relevant Issues:

Whether the sale of two marble cutting machines to Rita Perkins for GBP 10,000 in July 2022 is a voidable transaction.

Relevant Statutory Provisions:

Insolvency Act 1986, Section 238 - Transactions at an undervalue. An administrator or a liquidator can apply to the court to set aside any transaction at an undervalue.

The court may set aside a transaction as a transaction at an undervalue under section 238 of the Act if all of the following conditions are satisfied:

- *The company:*
  - *made a gift or otherwise entered into a transaction on terms that provided for the company to receive no consideration; or*
  - *entered 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 238(4))*
- *The transaction was entered into during the two years before the onset of insolvency (the relevant time) (section 238(2).*

- ***The company was unable to pay its debts at the time of the transaction or became unable to pay its debts as a result (the insolvency requirement) (section 240(2)) (and see *Where the transaction was made with a connected person, below*)***

Whether the liquidator may take any action

- ***A liquidator does not need to obtain the sanction of its members, the creditors' committee, the creditors or the court before making an application (sections 165 and 167 as amended by section 120, Small Business, Enterprise and Employment Act 2015). This is therefore no impediment re. an application against Rita.***
- ***A liquidator may need the consent of a floating charge holder under rules 6.45 or 7.113 of the Insolvency (England and Wales) Rules 2016 (SI 2016/1024) (IR 2016) where, in order to pay litigation expenses, the liquidator will need to have recourse to property subject to the floating charge.***
- ***Where an application to set aside a transaction at undervalue is brought, it is for the applicant to satisfy the court as to the value (and deficiency) of the consideration provided to the insolvent company.***
- ***A transaction at an undervalue is susceptible to challenge only if it took place at a relevant time. The relevant time is defined in section 240(1)(a) of the Act as a period of two years ending with the onset of insolvency. In a voluntary liquidation, the onset of insolvency is the date on which the company passed a resolution for its winding up, (sections 86, 240(3)(e).)***
- ***Where the transaction was made with a connected person, there is a presumption that the company was insolvent at the time, unless it can be shown otherwise (section 240(2)). A person is connected with a company if that person is, *inter alia*, a director of the company. (Section 249.) This applies to Rita.***
- ***An application to court must comply with the requirements of rule 1.35 of the IR 2016. The application should be made in the name of the office-holder, in the capacity as liquidator or administrator of the company. Where an application to court is required, it is likely that the matter will be determined at a full hearing. The determination of a claim relating to a reviewable transaction generally requires the court to fully consider the relevant evidence. The court will not make an order to set aside a transaction at an undervalue if it is satisfied as to both: (i) The company entered into the transaction in good faith and for the purpose of carrying on its business; and (ii) at the time it did so there were reasonable grounds for believing that the transaction would benefit the company. (Section 238(5).) Once an undervalue has been established in respect of a transaction, it will be for any respondent, particularly if that person is associated with the company, to justify the transaction (and this may also be the case where the transaction may also constitute a director misfeasance). For an example of the court determining that a respondent director had not discharged this burden, see *Ingram (Liquidator of MSD Cash and Carry plc) v***

***Singh et ors*[2]. Rita would therefore have to justify the transaction. On the facts, it seems unlikely that (i) The company made a £15,000 loss within a year in good faith and for the purpose of carrying on its business; and (ii) At the time it did so there were reasonable grounds for believing that the transaction would benefit the company.**

- ***If the conditions for a transaction at an undervalue are satisfied (and there is no successful defence), the court may make any order it thinks fit to restore the position to what it would have been if the company had not entered into that transaction (section 238(3)). Following a successful application against Rita, where are a range of remedies available to the court, but the most likely is that she would be required to pay the c£15k benefit she received from the Company to the liquidator for the benefit of the pool of creditors.***

Question 4.3 [maximum 4 marks]

Commented [WPA14]: 0/4 unfortunately s 239 is not arguable on the facts as the transaction occurred after the onset of insolvency not before it. The onset of insolvency is the date of the petition. The only cause of action available is based upon s 127.

The payments to Hard and Fast Ltd.

Summary. ***The payments made to* Hard and Fast Ltd (**Hard'n'Fast**) *in the month preceding the winding up order may be considered preferential payments under Section 239 of the Act. If the liquidator finds that these payments were made with the intention of preferring one creditor over others, they may apply to court to have the payments set aside and the funds recovered for the benefit of all creditors.***

Relevant Issues:

Whether the payments made to Hard'n'Fast in the month preceding the winding up order are preferential payments.

Relevant Statutory Provisions:

Insolvency Act 1986, Section 239 - Preferences (England and Wales).

Whether the liquidator may take any action

The requirements for an application under s239 are:

- ***The transaction put the creditor in a better position than it would otherwise have been in on the company's insolvency. This may be the case, if Hard'n'Fast received preferential terms.***
- ***The company was influenced by a desire to prefer the creditor. This intention is presumed where the transaction was with a connected person, but there does not seem to be any connection between the Company and Hard'n'Fast, so the liquidators would need to prove this.***
- ***The company was insolvent at time of the transaction or became insolvent as a result of the transaction. This is a question of fact, and would require further information on the Company's financial position at the time. Analysis of both***

[2] ***[2018] EWHC 1325 (Ch)***

the bank accounts and the directors' board meeting minutes would likely be dispositive of this question.

- ***The relevant time period requirement is met here, as it was only a month before the winding up order. The section catches any transaction during the six-month period before onset of insolvency (or two years for with a connected person). Finally, the liquidator has six years to bring the claim against HardnFast (Section 8, Limitation Act 1980.)***
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* End of Assessment *